85-1745

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RIXSON MERLE PERRY,

Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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April 21, 1986

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QUESTIONS PRESENTED*

1. Whether an applicant for federal employment, who has been so stigmatized by the government as to foreclose him, as a practical matter, from any opportunity for employment with the federal government or any law enforcement agency, must be deemed to have no right to relief under the fifth amendment for deprivation of a protected liberty interest unless he can also establish the existence of some statutory or other legal barrier to employment?

2. Whether a hearing is required when the federal government stigmatizes an applicant for government employment and deprives him of his fifth amendment protected liberty interest?

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* Petitioner, who was the only plaintiff in the district court, is an individual. Respondents, which were the only defendants in the district court, are the following federal government agencies: the Federal Bureau of Investigation, the United States Marshals Service, the Internal Revenue Service and the Department of Agriculture.

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FEDERAL BUREAU OF INVESTIGATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Rixson Merle Perry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, in this case.

OPINIONS BELOW

The opinions of the court of appeals, sitting *en banc* (App. A., *infra*, 1-25), are reported at 781 F.2d 1294. The opinions of the original panel of the court of appeals (App. B., *infra*, 26-49) are reported at 759 F.2d 1271. The memorandum opinion and order of the district court (App. C., *infra*, 50-63) is not reported.

JURISDICTION

The judgment of the court of appeals, sitting *en banc*, was entered on January 23, 1986. (App. D, *infra*, 64.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Background

In 1976, petitioner Rixson Merle Perry, a former FBI employee, applied for a job as an enforcement agent with the Bureau of Alcohol, Tobacco and Firearms ("BATF"). The BATF extended a tentative offer of employment to Perry, subject to the results of a mandatory FBI clearance. (App. B, *infra*, 28.)

Pursuant to the BATF's request, the FBI sent the BATF a five-page report about Perry. The FBI's report contained numerous allegations, all made by unidentified informants, and each of which Perry maintains to be untrue, that Perry has a history of serious misconduct, including numerous alleged impersonations of state and federal law enforcement officers. (App. A, *infra*, 4-6.) The FBI's report quotes certain unnamed informants who allegedly saw Perry armed and impersonating a United States Marshal in local bars, and the report purportedly substantiates those accusations by relating that the United States Attorney for the Northern District of Illinois authorized that Perry be "admonished" for that conduct. (App. A, *infra*, 5.) The FBI's report also details accusations that Perry would drive up to other vehicles on the highway while wearing a state trooper-style hat, "pretending" to talk on a car radio, and illegally stop motorists. (App. A, *infra*, 6; App. B, *infra*, 27.) The FBI's report further alleges that Perry had a "poor attitude," "a poor record" and a reputation "of being slightly odd." (App. A, *infra*, 6.) The FBI report also alleges that Perry "fail[ed] to obey orders" and obtained personal gasoline

discounts as a favor for dispatching tow trucks from certain gas stations while employed as a police dispatcher. (App. A, *infra*, 6.) A letter accompanying the FBI's report stated that the FBI "believes the enclosed [report] clearly reflects Perry's unstable nature." (App. B, *infra*, 27-28.)[1] After receiving the FBI's report, the BATF withdrew its offer of employment to Perry. (App. B, *infra*, 28.)

In 1977, Perry applied for a job as a criminal investigator with the Internal Revenue Service ("IRS"). Again, Perry was hired subject to the results of a mandatory FBI check. When the IRS received the FBI's report, the IRS also nullified Perry's appointment. (App. B, *infra*, 28.) The FBI's report also caused Perry to be rejected for law enforcement positions with the United States Marshals Service and the United States Department of Agriculture. (App. B, *infra*, 28.)

After Perry requested and received a copy of the FBI's report under the Privacy Act, Perry denied the report's allega-

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[1] Perry specifically averred in an affidavit in support of his memorandum in opposition to the FBI's motion for summary judgment that the FBI's cover letter was disseminated to the BATF, and the panel opinion expressly stated that the FBI's cover letter "accompanied the report." (App. B, *infra*, 27-28.) However, the majority of the Seventh Circuit, sitting *en banc*, concluded that the cover letter had not been disseminated along with the FBI's report. Inasmuch as the FBI proceeded in the district court on its own motion for summary judgment, the facts alleged by Perry in opposition to the FBI's motion must be regarded as true. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). In any event, however, dissemination of the FBI cover letter is not essential to Perry's liberty interest claim. The FBI report itself alleges serious misconduct and impugns Perry's honesty, mental stability and fitness to serve as a law enforcement officer. The "conclusions" stated formally in the cover letter are obvious to any reader of the report itself. Thus, regardless of whether the FBI cover letter was disseminated, the dissemination of the stigmatizing FBI report, which the FBI does not dispute, deprived Perry of a constitutionally protected liberty interest.

tions. Perry believes that the FBI is disseminating an untrue report about him in retaliation for his breach of an employment contract with the FBI and his subsequent criticism of the agency. (App. B, *infra*, 27.)

2. District Court Proceedings

In July 1977, after learning of the existence of the FBI's report, Perry commenced this action against the FBI and the other federal agency defendants in the United States District Court for the Northern District of Illinois. Perry alleged that the defendants had deprived him of his fifth amendment right to liberty by disseminating a stigmatizing report and effectively foreclosing him from any opportunity for employment with the federal government or with any law enforcement agency. (App. C, *infra*, 51-52.) Perry asked that the court require the FBI to grant him a hearing to refute the accusations in the report and to clear his name, and, also, that the court enjoin the FBI from further dissemination of the report. (App. A, *infra*, 23.)

In a series of opinions, the district court initially held that Perry stated a claim under the fifth amendment for deprivation of a protected liberty interest. Subsequently, the district court reversed its holding and granted summary judgment in favor of the defendants on the ground that no protected liberty interest of Perry's had been implicated. (App. C, *infra*, 50-63.) Perry, proceeding *pro se*, appealed the district court's decision.

3. Court of Appeals Proceedings

On April 11, 1985, a divided panel of the United States Court of Appeals for the Seventh Circuit reversed the district court's dismissal of Perry's fifth amendment claim. The majority held that the FBI had deprived Perry of a fifth amendment protected liberty interest because the FBI's report effectively foreclosed any possibility for Perry to be employed with any federal government or law enforcement agency. Accordingly, the panel remanded the case to the district court to determine whether Perry had been deprived of that liberty

interest without due process of law. (App. B, *infra*, 40.) The dissenting judge would have held that Perry had not been deprived of any constitutionally protected liberty interest. (App. B, *infra*, 44.)

On May 24, 1985, the FBI filed a petition for rehearing and suggestion of rehearing *en banc*, which was granted on August 5, 1985. Oral arguments were presented to the *en banc* court on September 26, 1985.

On January 23, 1986, the *en banc* court, by divided vote, reversed the panel decision. The majority held that the FBI's report did not implicate any protected liberty interest because Perry was not "subject to a *statutory* employment ban" and "no *legal* barrier to Perry's future employment in the government or elsewhere was ever imposed." (App. A, *infra*, 9, 14 (emphasis added.))

The dissenting judges concluded that Perry had stated an actionable fifth amendment claim. They concluded that the absence of a statutory or other legal barrier to employment was immaterial because the FBI's report had effectively deprived Perry of all opportunity for any employment with the federal government and with any state or local law enforcement agency (App. A, *infra*, 21-24; App. B, *infra* 36-38.)

REASONS FOR GRANTING THE WRIT

The *en banc* decision of the Seventh Circuit in this case has dramatically eviscerated this Court's teaching that a fifth amendment protected liberty interest may be implicated when the government imposes on a candidate for employment "a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972). By pronouncing that the only "disability" that can implicate a constitutionally-protected liberty interest is a statutory or other legal barrier to

future employment, the Seventh Circuit has directly contravened the holdings of this Court and the law of every other circuit. In addition, the Seventh Circuit has divested practically all present and prospective federal government employees in that Circuit of any protection from stigmatizing government charges. Moreover, by holding that even when stigmatizing accusations implicate protected liberty interests the government need not afford a hearing to refute the charges, the Seventh Circuit has contravened directly this Court's teaching in *Codd* v. *Velger*, 429 U.S. 624 (1977), and is in direct conflict with the holdings of the First, Eleventh and District of Columbia Circuits. Given the importance of the constitutional issues presented and the manifest need for uniformity among the Circuits on this important question of federal constitutional law, review by this Court is now warranted.

I.

THE SEVENTH CIRCUIT'S RULING THAT A STATUTORY OR OTHER LEGAL BARRIER TO FUTURE EMPLOYMENT IS NECESSARY TO IMPLICATE A FIFTH AMENDMENT PROTECTED LIBERTY INTEREST CONFLICTS WITH THIS COURT'S HOLDINGS AND WITH THE LAW IN EVERY OTHER CIRCUIT.

In *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972), this Court held that even a person who has no property interest in government employment may still assert a claim under the fifth amendment for deprivation of a protected liberty interest when the government "make[s] any charge against him that might seriously damage his standing and associations in the community" or "impose[s] on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." *See also Paul* v. *Davis*, 424 U.S. 693, 705 (1976) (recognizing that constitutionally-protected liberty interests are implicated " 'where government action has operated to bestow a badge of disloyalty or infamy, *with an attendant foreclosure from other employment opportunity.*' ") (quoting

Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 898 (1961) (emphasis added by the *Paul* Court)). As this Court recognized in *Roth* and *Paul*, "'to be deprived not only of present government employment but of future opportunity for it certainly is no small injury when government employment so dominates the field of opportunity.'" *Paul*, 424 U.S. at 704; *Roth*, 408 U.S. at 574 (quoting *Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 185 (1951) (Jackson, J., concurring)).

Contrary to the Seventh Circuit's holding, this Court has never suggested that a "foreclosure from other employment opportunity" must take the form of a statutory or other legal barrier to future employment before a constitutionally protected liberty interest may be implicated. Instead, this Court has made clear that a formal, legal barrier to future employment is *not* a prerequisite for asserting a liberty interest claim. *Owen* v. *City of Independence*, 445 U.S. 622, 634 (1979).

In *Owen*, city officials fired their police chief and publicized untrue, stigmatizing accusations that impugned his honesty and integrity. The *Owen* plaintiff did not face any statutory or legal barrier to future employment. Nevertheless, this Court held that he stated a claim for deprivation of a protected liberty interest because the stigmatizing accusations had foreclosed his opportunity for future employment. 445 U.S. at 634 n. 13. *Accord, Codd v. Velger*, 429 U.S. 624, 628-29 (1977) (per curiam) (assuming that if a probationary police officer who was fired amidst stigmatizing accusations that he attempted suicide had alleged that the accusations were false, he would have stated a claim for deprivation of a protected liberty interest even though he was not subject to any legal barrier to future employment).

Likewise, until the Seventh Circuit's *en banc* opinion, every court of appeals has followed this Court's teachings in *Owen* and *Codd*. Each of the circuits has held that the government's stigmatizing accusations may implicate a constitutionally pro-

tected liberty interest even in the absence of any statutory or other legally imposed barrier to future employment. For example, in *Bartel* v. *Federal Aviation Administration*, 725 F.2d 1403, 1415 (D.C. Cir. 1984), the District of Columbia Circuit held that Bartel, a former FAA employee who had unsuccessfully applied for reemployment as an air safety inspector, stated a claim for injury to a protected liberty interest based on an FAA official's letter which falsely accused him of having violated the Privacy Act during his prior employment. Even though Bartel was not subject to any legal barrier to future employment, the District of Columbia Circuit recognized that a protected liberty interest was implicated because the stigmatizing accusations "effectively abridged his freedom to take advantage of public employment." *Bartel*, 725 F.2d at 1415.

Similarly, the District of Columbia Circuit held recently that a Department of Justice attorney, who was terminated and publicly accused of unprofessional conduct and dishonesty, stated a claim for deprivation of a protected liberty interest even though she was not subject to any legal barrier to future employment. *Doe* v. *Department of Justice*, 753 F.2d 1092, 1104-12 (D.C. Cir. 1985). The *Doe* Court recognized that by disseminating stigmatizing charges to prospective employers, the Department of Justice had "effectively foreclosed future employment opportunities with the government as well as private employers." *Doe*, 753 F.2d at 1110.

As Judge Bork recently stated in *Mosrie* v. *Barry*, 718 F.2d 1151, 1160-61 (D.C. Cir. 1983), a constitutionally-protected liberty interest is implicated whenever the government "impair[s] one's ability to take advantage of a legal right such as a right to be considered for government contracts or employment or a right to seek non-government employment, [so] that the government can be said to have 'foreclosed' one's ability to take advantage of it and thus extinguished the right." By imposing the additional requirement of a statutory or other legal barrier to future employment before considering the violation of a liberty interest to be actionable, the Seventh Circuit's *en banc*

majority directly conflicts with the holdings of the District of Columbia Circuit and every other court of appeals.[2]

Even though they are unaccompanied by a statutory or other legal barrier to employment, the untrue accusations disseminated by the FBI's report undoubtedly are so serious as to have effectively foreclosed any opportunity for Perry ever to obtain a position in his chosen career in public law enforcement. The FBI's report was particularly damaging because, as the FBI conceded in the court of appeals, a check of the FBI's investigatory files is mandatory for all civilian applicants for federal government employment. (App. B., *infra*, 43.) Moreover, state and local law enforcement agencies also routinely check the FBI's files before hiring new personnel. (App. B, *infra*, 43.) In these circumstances, it is manifest that the FBI's report has stigmatized Perry and foreclosed his opportunity to obtain any work in his chosen field. As the dissenting judges

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[2] *See Rodriguez de Quinonez* v. *Perez*, 596 F.2d 486, 488-89 (1st Cir.), *cert. denied*, 444 U.S. 840 (1979) (liberty interest implicated when government employer fired employee and publicly accused him of dishonesty; no legal barrier to future employment involved); *Huntley* v. *Community School Board of Brooklyn*, 543 F.2d 979, 984-86 (2d Cir. 1976), *cert. denied*, 430 U.S. 929 (1977) (liberty interest implicated when public school board fired its principal and publicly charged that he was "responsible for the rapid deterioration of the school"; no legal barrier to future employment involved); *McKnight* v. *Southeastern Pennsylvania Transportation Authority*, 583 F.2d 1229, 1235-39 (3d Cir. 1978) (liberty interest implicated when government agency fired its investigator and publicly charged that he was intoxicated; no legal barrier to future employment involved); *Cox* v. *Northern Virginia Transportation Commission*, 551 F.2d 555, 558 (4th Cir. 1976) (liberty interest implicated when government agency fired its administrator and accused him of financial misconduct; no legal barrier to future employment involved); *Dennis* v. *S&S Consolidated Rural High School District*, 577 F.2d 338, 343 (5th Cir. 1978) (liberty interest implicated when public school board fired a teacher and charged that he was intoxicated; no legal barrier to future

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asked rhetorically below: "What government agencies would employ Perry after studying the FBI's comments?" (App. A, *infra*, 21.)

This Court and the courts of appeals consistently have held that accusations such as those leveled against Perry are no less stigmatizing simply because they are not accompanied by a statutory or other formal, legal barrier to future employment. To the contrary, the courts have recognized that stigmatizing accusations such as those contained in the FBI's report can foreclose opportunities for employment as effectively as any conceivable statutory barrier might. To remove, as the Seventh Circuit has done, any possibility for redress except for those rare instances when the foreclosure from employment opportunities is codified by an express legal barrier would eviscerate fifth amendment liberty interest protections for virtually all stigmatized candidates for government employment in that

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employment involved); *Lake Michigan College Federation of Teachers* v. *Lake Michigan Community College*, 518 F.2d 1091, 1097 (6th Cir. 1975), *cert. denied*, 427 U.S. 904 (1977) (recognizing that "charges of mental illness, fraud and untruthfulness all have been held to affect the discharged employee's liberty"; no requirement of legal barrier to future employment mentioned); *Churchwell* v. *United States*, 545 F.2d 59, 62 (8th Cir. 1976) (liberty interest implicated when government hospital fired a nurse and publicly accused her of abusing drugs; no legal barrier to future employment involved); *Stewart* v. *Pearce*, 484 F.2d 1031, 1034 (9th Cir. 1973) (liberty interest implicated when state university fired a professor and publicly alleged that he was mentally unstable; no legal barrier to future employment involved); *McGee* v. *Draper*, 564 F.2d 902, 910 (10th Cir. 1977) (liberty interest implicated when school board fired a teacher and publicly accused her of engaging in sexual misconduct with her male students; no legal barrier to future employment involved); *Campbell* v. *Pierce County*, 741 F.2d 1342, 1344 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 1754 (1985) (liberty interest implicated when county fired its clerk and charged that she mishandled funds; no legal barrier to future employment involved).

circuit. Because the Seventh Circuit has eviscerated this Court's teachings in this important area of constitutional law, where justice requires nationwide uniformity of legal principle, and is in direct conflict with every other circuit, review by this Court is now warranted.

II.

THE SEVENTH CIRCUIT'S RULING THAT A HEARING IS NOT REQUIRED WHEN FIFTH AMENDMENT PROTECTED LIBERTY INTERESTS ARE IMPLICATED CONFLICTS WITH THIS COURT'S TEACHINGS AND THE HOLDINGS OF THE DISTRICT OF COLUMBIA, FIRST AND ELEVENTH CIRCUITS.

It is undisputed that Perry never was afforded any hearing to refute the stigmatizing accusations in the FBI's report. Nevertheless, the *en banc* Court concluded that even if Perry had been deprived of a liberty interest, due process "was amply satisfied" because Perry telephoned and wrote to prospective employers protesting that the accusations in the FBI's report were untrue. (App. A, *infra*, 18.)

The Seventh Circuit's holding contravenes this Court's clear directive that the remedy mandated by the due process clause for a victim of government stigmatization is a "hearing . . . to provide the person with an opportunity to clear his name." *Codd* v. *Velger*, 429 U.S. 624, 627 (1977) (*per curiam*). Defining the parameters of a *Codd* hearing, the Eleventh Circuit has "required that the claimant have notice of the charges which have been raised against him, and an opportunity to refute, by cross-examination or independent evidence, the allegations which give rise to the reputational injury." *Campbell* v. *Pierce County*, 741 F.2d 1342, 1345 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 1754 (1985). *See also Doe* v. *United States Department of Justice*, 753 F.2d 1092, 1113-14 (D.C. Cir. 1985) (post-termination *Codd* hearing required); *Rodriguez de*

Quinonez v. *Perez*, 596 F.2d 486, 490 (1st Cir.), *cert. denied*, 444 U.S. 840 (1979) (same). The Seventh Circuit has directly contravened this Court's teachings in *Codd* and is in conflict with the holdings of the other courts of appeals by eliminating the requirement of a hearing in cases involving protected liberty interests.

If the Seventh Circuit's ruling is not reviewed, Perry and similarly-situated employment candidates will be rendered powerless to challenge stigmatizing accusations in any meaningful way. Perry has had no opportunity to ascertain and contest the bases of the anonymous accusations against him, which have destroyed his professional reputation and foreclosed any opportunity for him to pursue his career in law enforcement. Relegating Perry and similarly-situated persons to placing telephone calls and writing letters in order to protest vilest accusations made by faceless informers is a wholly ineffectual protection of fifth amendment rights.

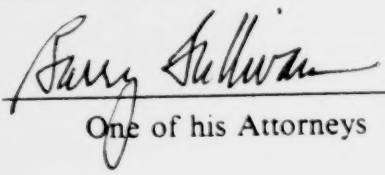
This Court has made clear that when liberty interests are implicated, the due process clause tolerates nothing less than a name-clearing hearing. *Codd* v. *Velger*, 429 U.S. 624, 627 (1977); *Board of Regents* v. *Roth*, 408 U.S. 564, 574 (1972); *Willner* v. *Committee on Character*, 373 U.S. 96, 105 (1963). *Cf. Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238 (1957) ("a State cannot exclude a person from . . . any . . . occupation in a manner or for reasons that contravene . . . Due Process.") The Seventh Circuit erred in concluding otherwise.

CONCLUSION

For the foregoing reasons, Rixson Merle Perry respectfully urges that this petition for a writ of certiorari should be granted.

Respectfully submitted,

RIXSON MERLE PERRY

By: 
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Dated: April 21, 1986

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APPENDIX

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Appendix A

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-1136

RIXSON MERLE PERRY,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 77 C 2466—**Abraham L. Marovitz,** *Judge.*

The original opinion in this case was issued on April 11, 1985 by a panel consisting of Chief Judge Cummings, Wood and Cudahy, Circuit Judges. *Perry v. FBI*, 759 F.2d 1271 (1985) (Wood, J., dissenting). On August 5, 1985 an order was entered by the court granting rehearing *en banc* only on the liberty interest issue discussed in Parts IV-VII of the panel opinion. A majority of the judges sitting *en banc* has adopted a disposition of the liberty interest issue differing from the majority view of the original panel.

ARGUED SEPTEMBER 26, 1985—DECIDED JANUARY 23, 1986

Before CUMMINGS, *Chief Judge*, BAUER, WOOD, CUDAHY, ESCHBACH, POSNER, COFFEY, EASTERBROOK, and RIPPLE, *Circuit Judges.**

WOOD, *Circuit Judge*. The only issue considered by the court *en banc* is Perry's claim that a Federal Bureau of Investigation (FBI) memorandum contained adverse and false information about him which was circulated to certain other federal law enforcement agencies to which he had applied for employment. On appeal there was also a question raised about whether the circulation was done maliciously. As a result of that memorandum Perry claims he was not hired, thereby implicating a liberty interest protected by the Fifth Amendment. The general factual background of this controversy is set forth in Part I of the original panel opinion, but will be reviewed here.

Perry sought law enforcement positions with the Bureau of Alcohol, Tobacco and Firearms (BATF), the United States Marshals Service, the Department of Agriculture, and the Internal Revenue Service. All four agencies rejected Perry's application. Perry blames the FBI primarily for those rejections. After Perry had authorized the release of information contained in police and criminal records related to him, the FBI released the information contained in its investigative report to the requesting federal law enforcement agencies.[1] Based on this alleged improper FBI action Perry sought an injunction restraining further dissemination of the FBI memorandum,

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* Judge Flaum did not participate in the *en banc* consideration of this case.

[1] In his *pro se* appeal brief Perry alleges that the BATF disseminated the FBI report to the Internal Revenue Service and the Department of Agriculture. Yet in his brief and at oral argument for the rehearing *en banc*, Perry's appointed counsel argued only about the FBI's dissemination of the report. Our opinion, therefore, refers only to the FBI in the discussion of the report's dissemination. Our analysis and the result, however, would remain unchanged even if the BATF had given the FBI report to the two other government agencies.

amendment of the FBI memorandum, an order appointing Perry to one of the federal employment positions which allegedly he had been wrongfully denied, together with an award of back pay, costs, and attorneys' fees.

I. Facts

A. The "Cover Letter" Issue

The controversial FBI information about Perry was contained in a five-page memorandum which was excised before distribution to protect informants. This memorandum was not compiled for employment purposes, but was the result of an FBI criminal investigation because of allegations, which the United States Attorney declined to prosecute, that Perry had impersonated a federal officer. The memorandum states that what it contains constitutes neither recommendations nor conclusions of the FBI, and says nothing one way or the other about hiring Perry.

In Part I of the original panel opinion the possibility is suggested that a separate letter, characterized as a "cover letter," may have accompanied the FBI memorandum to the agencies. That "cover letter" stated that the FBI report "clearly reflects Perry's unstable nature." The majority opinion states, however, that the record does not disclose if in fact this "cover letter" was actually distributed to the interested federal agencies. Moreover, Judge Marovitz in his conscientious consideration of this case in a series of memorandum opinions makes no mention of the "cover letter," but does note that the "first page" of the memorandum itself clearly sets forth the admonishment that it contains neither recommendations nor conclusions of the FBI.

Perry now argues in a supplemental brief filed after oral argument that by including the cover letter along with the five-page memorandum as an exhibit to his complaint he at least indirectly alleged its distribution by the FBI to the law enforcement agencies. Perry argues that he also "specifically averred that the FBI report was accompanied by the FBI cover letter." He did, but that is a

little misleading. What he actually stated in his district court affidavit was that the five-page memorandum, prepared in the Chicago FBI office for Bureau Headquarters in Washington, was accompanied by the cover letter. There is no averment that FBI Headquarters then forwarded the cover letter to the agencies. Quite to the contrary, Perry's affidavit continually refers only to the distribution to the agencies of the "five-page" memorandum. With the cover letter it would have been six pages. It appears that the present cover letter issue on appeal was prompted only by the reference to it in the original panel opinion.

Our own examination of the "cover letter" reveals that it did not purport to be a cover letter conveying the report to the requesting agencies. It was instead, even as Perry states in his affidavit when considered in context, an in-house memorandum from the Special Agent in Charge of the FBI's Chicago office, where the report was compiled, addressed to the Director, FBI, Washington, D.C., enclosing the report of the closed investigation of Perry. That was prior to this employment problem. That cover letter found its way into this record because the FBI made it available to Perry along with more than a hundred other FBI documents in response to Perry's request under the Privacy Act. Nothing in the record suggests that this cover letter was or even may have been distributed to the requesting agencies. The FBI, therefore, expressed no opinions to the other agencies about Perry. The FBI internally may have viewed Perry as unstable, but it kept that view to itself. In his post-argument brief Perry concedes that dissemination of the cover letter is not essential to his liberty interest claim, only the five-page memorandum itself. Therefore, we no longer consider the "cover letter" to be a factor.

B. The FBI Memorandum

The information that the FBI memorandum did contain undoubtedly could be expected to be of interest to any

federal law enforcement agency considering Perry for employment. The memorandum advises that the FBI employed Perry when he was eighteen-years old for several months as a clerk. The first bit of outside information comes not from some unnamed informant, but from Perry's own father, Reverend Perry. Reverend Perry advised the FBI that his son had told him that he had been required to carry a weapon when he was a clerk for the FBI, and that even though he was no longer employed by the FBI there was still the possibility that he would be called upon for some covert assignment. By affidavit Perry denies that his father ever made those statements. We find no affidavit by his father, but that is immaterial.[2]

An informant told the FBI that he overheard Perry in a bar claim to be a federal officer and to have served a subpoena upon a county sheriff in connection with a federal investigation. As might be expected, the United States Attorney for the Northern District of Illinois declined prosecution under the impersonation statute,[3] but did request that Perry be interviewed and admonished. He was interviewed and vehemently denied the charge, as the memorandum reveals. It does not appear in the memorandum that Perry did any more than talk about being a federal officer and having served a subpoena. The memorandum does not allege that Perry actually served any subpoena pretending to be a federal officer. To violate the statute a person must in fact act as a federal officer or obtain something of value. 18 U.S.C. § 912.

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[2] Anyone with any knowledge of the FBI, however, must realize that its eighteen-year-old clerks without agent training are not authorized to carry guns.

[3] 18 U.S.C. § 912 provides:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years or both.

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Another sample item from an informant indicates that Perry was armed and flashed a United States Marshal's badge in a bar. The United States Attorney again declined prosecution on this charge. It was only talk, as Perry did not actually use the badge. Being armed would ordinarily be a local matter.

Another item reported that Perry, for some reason, used a red light and siren in his car to stop other vehicles and that it cost him his job on the Deerfield Police Department. Another local police agency reported that one of its officers stopped Perry while he was driving his own car. A red light and siren were noted. No charges were filed by the officers, but the officers confiscated a blackjack and a tear gas pen with cartridges. Again the memorandum contained Perry's explanation that the siren was merely a car alarm, and that he was a dispatcher for the Illinois State Police. Apparently he was a state police dispatcher for a few months, but resigned. An informant said Perry had a poor record with the state police.

A police agency also reported that Perry would not be eligible for rehire because of poor attitude, failure to obey orders and allegedly receiving personal gasoline discounts for official favors as a dispatcher. It was also reported that Perry had a state trooper-style hat he wore while driving on the Illinois State Toll Road and would pretend to talk over a car radio. He was investigated by the state for impersonating a state trooper, but no disposition is shown. One trooper said Perry had the reputation of "being slightly odd." Perry was also hired as a dispatcher by a local police department, but for some undisclosed reason that job lasted only one night.

C. BATF's Actions

BATF, like the other federal agencies which considered Perry for employment, is a sophisticated federal law enforcement agency. BATF did not rely entirely on the FBI information, but conducted its own independent background investigation of Perry and then declined to hire

him. The affidavit of the BATF official who decided not to hire Perry explains how that agency went about considering Perry for employment. In compliance with Executive Order 10450, a full field preemployment background investigation was initiated because the position Perry was being considered for was classified as "critical sensitive."

While the investigation was still in progress that official had a conversation with Perry in which Perry advised that the FBI memorandum was not accurate. Later the official received the BATF investigation report. It included some new allegations not in the FBI memorandum. One item was that during a discussion Perry had pulled a gun on an acting chief of police for whom he had once worked. Another was that Perry had falsified his employment application by not admitting a state arrest for questioning and by failing to list employment with the Illinois State Police and with two other local police departments, one of which had fired him. The mayor of one town where Perry had worked reported that Perry "would be scary with a gun and this city would not rehire him."

As a result of BATF's refusal to hire Perry the United States Civil Service Commission incorrectly advised Perry that the Commission had sustained a request from BATF to disqualify him for an agent's position, but that he had a right to appeal. Shortly thereafter the Commission corrected its position and advised Perry that the Commission had not disqualified him, only BATF had individually rejected him. Therefore, the Commission advised, Perry's name had been restored to the register for consideration for employment by other federal agencies. There was no ban on federal employment imposed, and there was nothing left for Perry to administratively appeal.

II. Liberty Interest Analysis

After this lawsuit was begun, Perry by his affidavit in response to a motion for summary judgment fully and explicitly denied each and every allegation in the FBI

memorandum although as we later note he equivocated in his original objections in correspondence with the FBI. For our purposes in reviewing this summary judgment we accept Perry's latest statement, and consider the memorandum to have contained false information about him. The constitutional liberty interest issue must, therefore, be examined. There is no need, however, to discourse on due process generally in all job-related circumstances, only to examine the Perry liberty issue in its own particular preemployment factual setting.

A. *Larry v. Lawler*

We are first confronted with our fairly recent opinion in *Larry v. Lawler*, 635 F.2d 954 (7th Cir. 1976) (Wood, J., dissenting). Although recognizing that it was possible to distinguish *Larry* from this case because no broad and absolute employment ban barred Perry from all federal employment as was the situation in *Larry*, the majority in the original panel opinion in this case considered *Larry* to be close enough to be controlling. Larry had applied to the Civil Service Commission requesting that he be placed on the list of eligible applicants for employment consideration by various agencies and departments within the federal government. The Commission, as required by statute, conducted a standard background investigation to determine Larry's qualifications and suitability for employment. The investigation disclosed that Larry had a poor employment and arrest record and was a habitual and excessive user of intoxicants. The result was that under the statute Larry was totally barred from all federal employment for up to three years. The panel majority found a liberty interest on the basis that Larry had been stigmatized throughout the entire federal government and deprived of job opportunities in any of the branches of government for a substantial period of time. At the time of the panel's decision that three-year employment ban had terminated, but the majority considered that in reality the stigma had not come to an end, and therefore ordered Larry's adverse civil service record expunged.

No member of this *en banc* court has suggested that we fit *Perry* into the *Larry* mold, and, in the name of due process, expunge Perry's allegedly adverse law-enforcement-related record, and then proceed to grant Perry's request, even if we could, to appoint him to one of the federal law enforcement positions he was denied. Due process requires only fairness, not foolhardiness. If Perry does have a life, liberty or property interest in these preemployment circumstances, the Constitution requires that he be treated fairly and receive whatever due process fits the circumstances.

There may come a time when this court may have cause to reexamine *Larry*, but we need not do so now. Perry's difficulties are not government wide, nor is he subject to a statutory employment ban. His employment possibilities were confined to several law enforcement agencies within the executive branch, and those agencies were free to conduct their own background checks and to use their own employment discretion. The FBI did not purport to have done so. It is not its job to make job determinations for those agencies. The adverse information about Perry was not published nor distributed government wide.

The majority in *Larry* limited the application of *Larry* by emphasizing that Larry had not merely been denied a particular position, but had been totally disbarred throughout the government. *Larry*, 605 F.2d at 958. There is no justification for extending *Larry* to the present case. The majority in *Larry* did concede that the nature of Larry's liberty interest was difficult to define with exactitude. It is not so difficult, however, to determine that there is no liberty interest involved in *Perry* in its own narrow factual context.

Therefore, setting *Larry* aside, the basic starting point is to ascertain, as Judge Marovitz did, whether Perry's failure to be hired in these circumstances implicates a liberty interest of the type claimed. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). It does not, but even if we considered that it did, Perry had the full measure of

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process due in this preemployment situation. The due process Perry apparently seeks is not an agency hearing about the allegations, but primarily the award to him of a federal law enforcement position.[4]

B. Perry's Liberty Interest Claim

Although not claiming a life or property interest, Perry does claim a liberty interest. He does not, however, claim a liberty interest violation of the type which restrains him physically, only the liberty to be a federal law enforcement officer.

This is not the usual case where a government employee has been fired or not rehired. Neither party has cited any case dealing with a liberty interest in the preemployment context, and the court's own research has uncovered only two cases on the issue. Both of these cases summarily conclude that an unsuccessful applicant for federal employment has no interest requiring due process protection absent "infringement of a liberty interest such as reputation or free speech, [or] impairment of . . . [the applicant's] ability to get another job." *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980). *See also Thompson v. Link*, 386 F. Supp. 897 (E.D. Mo. 1974).

In the more serious situation of a firing or failure to rehire a government employee, a liberty interest is impli-

[4] On appeal, Perry requests a hearing, but does not specify who should hold the hearing or what the scope of the hearing should be. At rehearing *en banc*, Perry contends that the FBI must afford him due process and concludes that he is "entitled to an opportunity to refute the charges in the [FBI] report and clear his name." In a footnote to his brief for the rehearing *en banc*, Perry suggests remand to the district court to determine what process was due and whether Perry received it. Remand to the district court, however, is not necessary as Perry's interviews, denials, and his pursuit of a U.S. Civil Service Commission remedy provided all the due process he deserved even if he has a liberty interest which was harmed.

cated if "either (1) the individual's good name, reputation, honor or integrity are at stake by such charges as immorality, dishonesty, alcoholism, disloyalty, Communism or subversive acts or (2) the state imposes a stigma or other disability on the individual which forecloses other opportunities . . . ." *Munson v. Friske*, 754 F.2d 683, 693 (7th Cir. 1985). This case does not fall within any of the categories mentioned in *Carmi* and *Munson*. The FBI has neither injured Perry's reputation nor foreclosed his employment opportunities, and Perry does not allege an infringement of free speech.

1. Injury to Reputation

Perry has not sustained an injury to reputation cognizable under the due process clause. The FBI memorandum does not accuse Perry of an act of dishonesty that might be criminal. Perry's barroom talk is not of great moment. The FBI, for instance, did not label him as an embezzler or a thief. Nor is there anything in the memorandum to suggest any immorality whatsoever. Those types of accusations are examples cited in *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) as implicating a liberty interest. The memorandum information about Perry approaches nothing involving moral turpitude. *See Lawson v. Sheriff of Tippecanoe County, Ind.*, 725 F.2d 1136, 1138 (4th Cir. 1984).

The memorandum states, for example, that in October 1974, a United States Attorney declined to prosecute Perry for impersonating a federal officer, but asked that Perry be interviewed and admonished. Perry argues that this admonishment stigmatizes him because it suggests "to any knowledgeable reader that the United States Attorney believed the allegations in the report were true." That is not a reasonable inference, as it could also be speculated that the admonition was only precautionary and did not represent a determination that the allegations were true. In any event, whatever the United States Attorney may have believed is immaterial. The memoran-

dum's description of the admonishment does not amount to a stigma.

Most of what was contained in the FBI memorandum, even without the names of the informants (although Perry's father was identified), was easily subject to verification by the receiving agencies since most of it directly involved other police agencies in the same general area. Likewise Perry knew where he had worked, why employment was terminated, and if and when and for what he had been stopped, questioned and admonished. Most was information he should have had little trouble refuting. In addition to being clearly designated that it was not to be construed as a recommendation nor a conclusion of the FBI, the information was presented in a straightforward manner without editorial comment. The memorandum also contained several direct denials by Perry made at the time of the various incidents.

The memorandum was not distributed to some agency not capable of evaluating or verifying that type of raw information. The memorandum specifically instructs that it is the property of the FBI and is merely being loaned to the requesting agency. It further directs that the memorandum and its contents are not to be distributed outside that particular agency. There was no general widespread publication of the memorandum even within the government. The memorandum's distribution was strictly limited to a few specified law enforcement agencies all within the executive branch of the federal government. We need not, therefore, consider at this time the consequences of any potential for wider distribution of this or similar memoranda.

It is difficult to determine from an examination of the maze of pleadings, amended complaints, exhibits, affidavits, and briefs just exactly what information in the memorandum Perry claimed from time to time was false. Before this litigation began Perry wrote the Director of the FBI and took up the memorandum incidents one at a time. In that letter, for instance, he asks that the para-

graph about him impersonating an officer be deleted as the incident was not sufficient to warrant prosecution. He does not deny that in fact he did what the report said he did. Likewise he asks that the paragraph about having a deputy marshal's badge be deleted because no prosecution was commenced. Again he does not deny that in fact he flashed the badge of a federal officer. It was reported that he carried numerous weapons in the trunk of his car. He does not deny it, but says he sees no relevance to it. Another item reported him carrying a .44 magnum pistol and having a police radio. Perry says that should be expunged since he had not been convicted for it. He does not deny the truth of the information. He also asks generally for deletions of all references to impersonating officers since he was not convicted. He does not deny the impersonations. Perry also claims that some things never happened.

Even if Perry had originally and explicitly denied each and every item in the memorandum, however, there is a pattern of conduct which emerges which fully justified the FBI's dissemination of the memorandum to interested federal law enforcement agencies to serve as employment investigative leads, but leads which obviously required further verification. It was not the responsibility of the FBI to run out all these leads for the employment purposes of other agencies. The FBI was neither hiring Perry nor advising any other agency about hiring him. The FBI file was the result of an investigation of Perry for allegedly impersonating federal officers. The agencies could follow the leads or ignore them in their own discretion. The agencies could hire or not in their own discretion. The FBI never imposed a ban on hiring Perry.

Putting all Perry's impersonation and other conduct aside, the various police agency evaluations of Perry for which he had worked which stated, for instance, that Perry would not be rehired because of poor attitude, failure to obey orders, and misuse of his job for personal gain is classic employment information, not within any police or criminal record category. That information alone,

easily verifiable, could justify employment rejection by a federal law enforcement agency. Perry, however, did not make known on his employment application those short-time jobs in law enforcement which may have had unsatisfactory conclusions.

2. Stigma or Disability Foreclosing Job Opportunities

The FBI did not impose a stigma upon Perry which foreclosed his employment opportunities. *Adams v. Walker*, 492 F.2d 1003 (7th Cir. 1974), somewhat clarifies the meaning of the word "stigma." After examining the cases cited in *Board of Regents v. Roth*, this court in *Adams* concluded that no stigma to reputation occurred when the Governor of Illinois dismissed the plaintiff from his position as chairman of the Illinois Liquor Commission for incompetence, neglect of duty and malfeasance in office. The *Adams* court noted that "nothing in the complaint even remotely suggests a legal barrier to future employment analogous to denial of admission to the bar, disqualification from all government employment, . . . or sending substantial adverse information to a professional licensing agency." 492 F.2d at 1009.

No legal barrier to Perry's future employment in the government or elsewhere was ever imposed, except for a short period due to a mistake of the Civil Service Commission which caused him no harm. No barrier exists now. The record contains a letter dated May 1, 1978 from the Civil Service Commission informing Perry that "this office has made a determination in your favor based on known suitability matters. . . . Your eligibility will provide you with full consideration for all positions for which you qualify." Perry's brief confirms that the Commission "conducted an intensive investigation" and "ruled that plaintiff was suitable for . . . [federal] employment and ordered the restoration of plaintiff's name to all eligibility rosters on which he had attained placement."

Although dissemination of the FBI memorandum may have lessened Perry's employment opportunities in cer-

tain areas of the federal government, a liberty interest is not implicated merely by a reduction in an individual's attractiveness to potential employers. *Lipp v. Board of Education of City of Chicago*, 470 F.2d 802, 805 (7th Cir. 1972), *quoted with approval in Hadley v. County of DuPage*, 715 F.2d 1238, 1247 (7th Cir. 1983). *See also Roth*, 408 U.S. at 575 ("It stretches the concept of liberty too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another.").

The FBI conduct about which Perry complains was not disciplinary or punitive. The FBI conducted a routine investigation of Perry on possible criminal charges. An argument arose on appeal about whether the FBI acted "maliciously" in disseminating the memorandum, or had "intentionally" fabricated the incidents. We cannot find in the record that Perry attempted to show that the FBI actually fabricated false information and distributed it with some malicious intent. At most the FBI information was only incorrect. Judge Marovitz did not mention any claim of deliberate falsification. If the FBI had some malicious intent it likely would have included in its memorandum other uncomplimentary information it had about Perry.[5] It could also have slanted the report and included some admonition about not hiring Perry. The FBI did none of these things. In his post-argument brief Perry himself, however, helps lay that "malicious" and "intentional" issue argument to the side, and takes the position that "malicious" dissemination and "intentional" fabrication are not essential elements of his liberty claim. Perry relies only on the five-page memorandum. That side issue of the case, therefore, need no longer be pursued.

[5] Some information the FBI had, for instance, was not in its memorandum. Perry, it is said, enrolled in Trinity College and advised college officials that he needed certain special considerations including a private dormitory room, private phone, and a locked storage cabinet as a condition of his FBI employment. The college officials, it appears, may have believed him and provided him with these rather unusual college amenities.

The BATF conducted its own investigation and did not rely exclusively upon the FBI report in making its employment decision. The BATF officer who made the employment decision stated that even without the FBI report and based on BATF's own investigation he would have concluded that Perry was not suitable for employment as an agent. BATF's decision determined only that Perry was not suitable for one particular job; BATF neither publicly criticized Perry nor expressed any opinion about Perry's suitability for another government position. BATF simply exercised its own judgment about the desirability of hiring Perry for a specific position in that one agency. A mere failure to hire, considering all the circumstances of this case, does not meet the "stigma plus" standard as characterized in *Colaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976), *cert. denied*, 430 U.S. 960 (1977).[6]

III. Due Process Claim

As the government has neither injured Perry's reputation nor imposed a stigma foreclosing his employment opportunities, the government has not deprived Perry of any liberty interest protected by the Fifth Amendment. However, even assuming that Perry has a liberty interest which the government's actions have infringed, Perry has received full measure of the process he is due.

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Perry's original request to be appointed to a federal job far exceeds the necessary relief appropriate to this case if the FBI did

[6] This court's interpretation in *Colaizzi* of the holding in *Paul v. Davis*, 424 U.S. 693 (1976), has become known as the "stigma plus" test. The *Colaizzi* court stated that, although a stigma to reputation alone does not constitute a deprivation of liberty, "infliction of a stigma to reputation accompanied by a failure to rehire (or *a fortiori*, by a discharge) states a claim for deprivation of liberty without due process . . . ." 542 F.2d at 973.

violate due process by giving the memorandum to other government law enforcement agencies. Perry's vague request on appeal and at rehearing for a hearing to "clear his name" has in essence been satisfied as Perry had numerous opportunities, short of a full hearing, which he took advantage of to protect his interests. A hearing of some kind to be held by some agency was not necessary to satisfy the mandates of due process.

The function of a due process hearing is "to provide the person an opportunity to clear his name." *Roth*, 408 U.S. at 573 n.12. Perry had ample opportunity to "clear his name" and to refute the information in the FBI memorandum through a variety of channels other than by a full hearing. The memorandum itself contains Perry's denials and explanations. Perry discussed the memorandum in detail with various federal officials in person, by letter, by phone and submitted exculpatory material in writing. Perry conferred with the Civil Service Commission and had his name reinstated on the eligibility roster.

Perry was given several opportunities at various times to dispute the allegedly false information in the FBI memorandum. The FBI memorandum itself contains Perry's denial of at least one incident and Perry's explanation of another. After BATF's rejection Perry had phone conversations with two BATF officials, the official who declined to hire Perry and the official in charge of the background investigation. Among other things, the FBI memorandum was mentioned and Perry was given an opportunity to explain the events reported.

Perry also wrote to the Director of the FBI listing in detail specific changes he wanted made in the memorandum. Although the FBI refused to expunge the material as Perry requested, it did put Perry's letter challenging the memorandum's accuracy in its file.

Even if we were to find that Perry has a liberty interest, additional due process requirements would constitute an unnecessary and impractical burden on federal law enforcement practices. Federal law enforcement posi-

tions are too critical and sensitive to make it unnecessarily difficult for one federal law enforcement agency to pass pertinent investigative leads to another federal law enforcement agency for its consideration.

Perry may have suffered a serious deprivation in not being hired for a government job, but the private interest involved is only one of three factors to be weighed in the due process analysis. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1975); *Board of Curators v. Horowitz*, 435 U.S. 78, 86 n.3 (1977). The other two factors to be considered are "the risk of erroneous deprivation of such [a private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards and the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Matthews*, 424 U.S. at 335. The burden on the government, and particularly the FBI, of holding a full hearing in these circumstances for every unsuccessful job applicant would not only be enormous, but also misguided. On balance, the risk to public safety far outweighs the possibility that some potential law enforcement employer might rely on the leads in the FBI file, without more, in rejecting an otherwise qualified applicant who disputed the validity of the information.

We find that no liberty interest was harmed; but beyond that, even if there may have been a liberty interest, due process was amply satisfied.

AFFIRMED.

POSNER, *Circuit Judge*, concurring. I join the majority opinion and write separately merely to suggest an additional ground for the decision. We know from *Paul v. Davis*, 424 U.S. 693 (1976), that defamation is not a federal constitutional tort. But it does not follow that the common law of defamation is entirely irrelevant to cases where a person complains that a government agency deprived him of liberty by disseminating derogatory falsehoods about him. An established defense in the law of defamation is the defense of privilege in cases where there is a legal or moral duty to communicate, as where an employer gives a character reference to a firm to which his former employee has applied for a job, or a credit bureau discloses to its members someone's credit rating, or, most pertinently, one public officer communicates with another in the discharge of his official duties. See Prosser and Keeton on the Law of Torts § 115, at pp. 826-30 (5th ed. 1984).

Although the privilege is "qualified," meaning it is forfeited if the defendant acts in bad faith, Perry has never tried to prove bad faith and his briefs on appeal do not claim bad faith. Any charge that the FBI either fabricated or maliciously disseminated the derogatory information about Perry that went to the other federal agencies would be highly implausible in the circumstances, so I am not surprised that he has not pursued it seriously. I would deem it abandoned, on the authority of such cases as *Hershinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984), and *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

If, therefore, Perry does not even have a common law defamation case against the FBI, then I am doubly doubtful whether he has a good federal constitutional case against the FBI. For I do not see how the FBI could reasonably be thought to have deprived him of his liberty of occupation without due process of law through a dissemination of information privileged under common law principles. Of course the Constitution sometimes puts government officials under tighter reins than the common

law would do. But the Supreme Court has made clear that so far as defamation by government officials is concerned, the Constitution puts them under looser reins. Just as it would be fantastic to suggest that a government official could be guilty of depriving a person of liberty of occupation by disseminating truthful, vocationally relevant information about the person, so it would be only a little less fantastic to suggest that an official could be guilty of such a deprivation in a case where his conduct would be privileged if the plaintiff had alleged defamation instead of a violation of the Constitution. That would turn *Paul v. Davis* on its head, by making it easier to bring defamation cases as constitutional than as common law tort cases rather than harder.

Against my analysis it can be argued that the essential holding of *Paul v. Davis* is merely that reputation, the interest that the law of defamation protects, is not liberty or property within the meaning of the due process clause. See 424 U.S. at 712. But where defamation is alleged to be the means by which the plaintiff was deprived of liberty, he must prove defamation, subject to generally recognized defenses that are not inconsistent with constitutional policy. Among those is the qualified privilege for internal communications on official business. It is a privilege sensibly designed to foster free communication within government on matters of official business. It is a complete defense to Perry's claim.

I emphatically do not suggest that every common law privilege is absorbed into constitutional tort law. Obviously a blanket immunity for all official misconduct would not be. Some common law privileges, however, clearly are. It is by this route that the absolute immunity of some government officials and the qualified immunity of others from damage suits under section 1983 have gotten into constitutional law; the statute does not refer to any such immunities. See, e.g., *Pierson v. Ray*, 386 U.S. 547, 553-57 (1967); *Cleavinger v. Saxner*, 106 S.Ct. 496, 500-01 (1985). Section 1983 is not self-contained; it was enacted against a background of common law principles which apply to

the extent, though only to the extent, that they are consistent with the statute's purposes. See, e.g., *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *Carey v. Piphus*, 435 U.S. 247, 254-59 (1978); *Taliferro v. Augle*, 757 F.2d 157, 161-62 (7th Cir. 1985); *Parrett v. City of Connersville*, 737 F.2d 690, 695 (7th Cir. 1984). A qualified privilege for internal governmental communications on matters of governmental concern fits the purposes of the statute as it has been interpreted by the Supreme Court in relation to defamation.

CUMMINGS, *Chief Judge*, with whom CUDAHY, *Circuit Judge*, joins, dissenting. There is little to add to the majority panel opinion in *Perry I*, 759 F.2d 1271 (7th Cir. 1985), to illustrate why I am compelled to dissent. That opinion was based principally on this Court's majority opinion in *Larry v. Lawler*, 605 F.2d 954 (7th Cir. 1978). *Perry I* is also in accord with *Owen v. City of Independence*, 445 U.S. 622, 633-634, which held that dismissal of a government employee because of an allegedly false statement against him deprived the employee of a protected liberty interest without due process of law. While the *en banc* majority strives to distinguish *Larry* on the ground that Larry "had been totally disbarred throughout the government" (p. 9), the effect of the allegedly false FBI report is of course the same here. What government agencies would employ Perry after studying the FBI's comments?

As contemplated in *Perry I*, it may of course turn out that the FBI report was accurate, but in granting summary judgment to defendants, the FBI report has to be presumed false. *Munson v. Friske*, 754 F.2d 683, 690 (7th Cir. 1985). Its truth or falsity must be tested on remand,[1]

[1] The stigmatizing statements in the report were denied by plaintiff (D. Ct. 1-15-81 mem. op. 8, pet. for reh. 4).

but at this juncture plaintiff cannot be deprived of his day in court even though he may later be unable to prevail.

The *en banc* majority relies particularly on the *Carmi* and *Thompson* cases[2] where relief was denied to governmental job applicants absent two factors present here, *viz.*, "infringement of a liberty interest such as reputation * * * , [or] impairment of * * * [the applicant's] ability to get another job" (p. 10). Unlike Perry, Carmi was not maligned and did obtain an apparently suitable job (620 F.2d at 674), whereas Thompson, a black claiming racial discrimination, was denied relief because he was not on the Civil Service eligibility list and because the 1972 Amendments to the Civil Rights Act of 1964 were held not to be given retrospective effect. Neither case involved a false government report that kept the plaintiff from jobs he was seeking. While the majority states that here "The FBI has neither injured Perry's reputation nor foreclosed his employment opportunities" (p. 11), these are the very issues that should be decided on remand, not here on summary judgment. Surely too this Court should not be deciding that a United States Attorney's request that Perry be admonished "does not amount to a stigma" (p. 12). Even lay persons would conclude to the contrary! Until there is a hearing before the district court, it cannot be properly said that the FBI has "neither injured Perry's reputation nor imposed a stigma foreclosing his employment opportunities * * *" (p. 16).

As Judge Bork pointed out in *Mosrie v. Barry*, 718 F.2d 1151, 1160-1161 (D.C. Cir. 1983), governmental defamation such as occurred here will constitute deprivation of liberty and give rise to a right to procedural due process if, as here, it impairs one's ability to take advantage of a legal right "such as a right to be considered for government

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[2] *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir. 1980), certiorari denied, 449 U.S. 892, and *Thompson v. Link*, 386 F. Supp. 897 (E.D. Mo. 1974).

* * * employment or a right to seek non-government employment * * * ." Thus in *Bartel v. F.A.A.*, 725 F.2d 1403, 1415 (D.C. Cir. 1984), where Bartel was denied a government job and reemployment at the GS-13 level because of a Federal Aviation Administration official's defamatory letters about him, the court of appeals held that the "district court must entertain Bartel's due process claims for damages attributable to wrongful conduct * * * , along with those [claims] for injunctive relief," and that it had wrongly granted summary judgment for defendants.

In his brief before us, Perry has only sought a remand "for factual development" (Br. 9), and his response to the petition for rehearing likewise only requests "an opportunity [on remand] to refute the charge in the [FBI] report and to clear his name" (Response 15). Therefore there is no need for us to "expunge Perry's allegedly adverse law-enforcement-related record, and then proceed to grant Perry's request, even if we could, to appoint him to one of the federal law enforcement positions he was denied" (p. 9).

I must also disagree with the concurring opinion. The allegations of the third amended complaint must be taken as true on defendants' motion for summary judgment. *Munson, supra; Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1985). Count I charges that the FBI report contains "untrue and malicious information," that it was "a willful and intentional attempt" by the FBI to deny Perry federal employment, and that the FBI's "acts, conduct and behavior * * * were done willfully, intentionally and maliciously" (realleged in that Count's pertinent Second Cause of Action) (R. Item No. 62, pp. 4-5). There is a well-recognized exception to the privilege of publishing employment references when, as here, the false report is made maliciously, *i.e.*, with reckless disregard as to truth or falsity. *Gaines v. Cuna Mutual Insurance Society*, 681 F.2d 982, 986 (5th Cir. 1982); *Miller v. Lear Siegler, Inc.*, 525 F. Supp. 46, 60 (D. Kan. 1981); *Zuschek v. Whitmoyer Laboratories, Inc.*, 430 F. Supp. 1163, 1166 (E.D. Pa. 1977), affirmed, 571 F.2d 573 (3d Cir. 1978); Re-

statement of the Law of Torts 2d § 600. Therefore, the privilege does not apply in this case.

Assuming without deciding that the employment-reference privilege applies in constitutional defamation (*i.e.*, "stigma-plus" cases), Perry has not abandoned the charge that the FBI either fabricated or maliciously disseminated the derogatory information about him, as indicated in the concurrence. See plaintiff's Opposition to Petition for Rehearing 1, 3, 7, 12, 14, 15, which reveals that Perry still contends that the FBI willfully and intentionally (*i.e.*, maliciously)[3] disseminated false information about him. Indeed, in its Memorandum in Support of its Motion for Summary Judgment, the FBI admitted that Perry is alleging that the FBI report contained malicious information about him (p. 5). Similarly, appointed counsel for Perry at the oral argument before us never abandoned Perry's charge that the FBI's report was false and maliciously disseminated. Such matters were to await proof at trial.

Since the *en banc* majority has not seen fit to overrule *Larry*[4] that authority requires reversal and remand in accordance with *Perry I*.

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[3] Allegations of willfulness and intent have been deemed by us as akin to malice. *Pape v. Time, Incorporated*, 419 F.2d 980, 982 (7th Cir. 1969), but Perry's complaint also specifically alleges malice.

[4] *Larry* was followed in *Doe v. United States Department of Justice*, 753 F.2d 1092, 1113-1114 (D.C. Cir. 1985); *Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953, 966 n.24 (D.C. Cir. 1980); *Jaffe v. Federal Reserve Bank of Chicago*, 586 F. Supp. 106, 108-109 (N.D. Ill. 1984); *Zurek v. Hasten*, 553 F. Supp. 745, 747 (N.D. Ill. 1982); *Blank v. Swan*, 487 F. Supp. 452, 455, 456-457 (N.D. Ill. 1980).

Bone v. City of Lafayette, 763 F.2d 295 (7th Cir. 1985), is not contra, because there the defamation did not affect employability (at p. 298).

No. 82-1136

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Appendix B

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-1136

RIXSON MERLE PERRY,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 2466—Abraham L. Marovitz, *Judge.*

SUBMITTED FEBRUARY 14, 1985*—DECIDED APRIL 11, 1985

Before CUMMINGS, *Chief Judge*, WOOD and CUDAHY, *Circuit Judges.*

CUMMINGS, *Chief Judge.* This case—involving an unsuccessful applicant for a series of jobs with the federal government—raises issues concerning the Fifth Amendment's Due Process Clause and the Privacy Act, codified in part at 5 U.S.C. § 552a. The district court ruled that dissemination of an allegedly false FBI report about

* After preliminary examination of the briefs, the Court notified the parties that it had tentatively concluded that oral argument would not be helpful to the Court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). Plaintiff-appellant has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

plaintiff to his prospective federal agency employers did not violate plaintiff's legal rights and granted summary judgment to defendants in a series of opinions. We affirm in part and reverse in part.

I.

In 1976 Rixson Perry applied for a job as enforcement agent with the Bureau of Alcohol, Tobacco and Firearms ("BATF"). The BATF informed Perry that he was being considered for an appointment, and Perry signed a form authorizing the agency to obtain background information on him; the only part of the release pertinent to this appeal is that Perry authorized the release of information contained in "police and criminal records." In May 1976, the FBI sent the BATF, at the latter's request, a five-page report on plaintiff which contained allegations of third parties that Perry had impersonated state and federal law enforcement officers on numerous occasions.[1] The report contained allegations that Perry (1) had posed on various occasions as an FBI agent, a United States Marshal, and an Illinois State Trooper; (2) had illegally stopped cars, using a red emergency light and a siren; (3) carried numerous weapons in the trunk of his car; and (4) possessed various badges and other forms of police identification.[2] A cover letter that accompanied the report

[1] The identities of the third parties were withheld from Perry when he finally obtained a copy of the report; it is not clear from the record if the names were expurgated from the report sent to the BATF. The FBI gathered this information in connection with earlier criminal investigations of plaintiff. The evidence was presented twice to the U.S. Attorney's office, but Perry was never prosecuted. Plaintiff, who worked for the FBI for several months in 1968 as a clerk, apparently believes that the FBI's actions are retaliation for plaintiff's breach of a one-year employment agreement with the FBI and his subsequent criticism of the agency.

[2] It is true, as the dissent points out, that the first part of 18 U.S.C. § 912 makes it a crime to impersonate a federal officer or

(Footnote continued on following page)

stated that the report "clearly reflects Perry's unstable nature." The record does not disclose whether this cover letter was sent to the BATF along with the report.

In June the BATF withdrew the tentative offer of employment it made Perry in April. Plaintiff alleges that in 1976, 1977 and 1978 he also did not receive law enforcement jobs with three other federal agencies—the U.S. Marshals Service, the Department of Agriculture, and the Internal Revenue Service (all defendants)—because of the FBI report. In particular, the complaint alleges that Perry was denied a position with the Marshals Service solely on the basis of information received orally from the FBI, the same information that was later compiled in the FBI report. (The district court's opinion of January 15, 1981, fixes the date of the decision not to hire Perry as April 22, 1976, three weeks before the date of the FBI report.) Moreover, Perry alleged that after being told by an official with the Department of Agriculture that he was an excellent candidate for a position with that agency, he was not hired because of the FBI report (allegedly transmitted to the Agriculture Department by the BATF). Finally, the record contains a copy of a 1977 letter from the IRS apppointing plaintiff as a criminal investigator, subject to an investigation of Perry. Three weeks later, plaintiff alleges, the job offer was withdrawn, based in part on the FBI report, which the IRS had received from the BATF.

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[2] *continued*

employee only if one "acts as such." The FBI report, however, includes an allegation that Perry had served a subpoena in connection with a federal investigation. In addition, it is unclear from reading the expurgated version of the report whether Perry was posing as a federal or state law enforcement official when he allegedly stopped cars illegally. If he was allegedly posing as a U.S. Marshal, this conduct could violate 18 U.S.C. §§ 912 and 913.

Plaintiff contends that the FBI report is false and that its dissemination and use by the defendant agencies violated rights guaranteed him by the Constitution and the Privacy Act. For purposes of reviewing the grant of summary judgment to defendants, we must assume that the report is indeed false. *Munson v. Friske*, No. 83-1446, slip op. at 7 (7th Cir. Jan. 29, 1985). Some of the claims presented below have dropped out. Three issues remain on appeal: (1) whether the FBI violated section (e)(5) of the Privacy Act, 5 U.S.C. § 552a(e)(5), in compiling and distributing the report; (2) whether the FBI's disclosure of the report to the BATF violated 5 U.S.C. § 552a(b); and (3) whether the dissemination of the report implicated a liberty interest protected by the Due Process Clause. The district court ruled against Perry on all three issues. We agree with the district court's decision on the Privacy Act questions, but reverse with respect to plaintiff's due process claim.

II.

Section (e)(5) of the Privacy Act requires each federal agency that maintains a system of records to "maintain all records which are used by the agency in making any *determination* about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the *determination*." 5 U.S.C. § 552a(e)(5) (emphasis supplied). Perry argues that this section requires the FBI to ensure that its records are accurate before sending them to other agencies. We disagree. Although we have found two cases in which section (e)(5) has been applied to an agency whose records were used by another agency in making a determination about an individual,[3] these decisions are inconsistent with the statute's language and the legislative history.

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[3] *See Doe v. United States Civil Service Comm'n*, 483 F. Supp. 539, 556 (S.D.N.Y. 1980) (since defendant served as the "in-

(Footnote continued on following page)

To begin with, section (e)(5) applies only to records used by an agency in "making any *determination*" about an individual. The legislative history indicates that the word "determination" in section (e)(5) "means any *decision affecting* the individual which is in whole or in part based on information contained in the record and which is made by any person or any agency." H.R. Rep. No. 1416, 93d Cong., 2d Sess. 15 (1974)(emphasis supplied).[4] The FBI made no decision or determination about Perry. It merely sent a report, summarizing information provided

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[3] *continued*

vestigatory arm" of the White House Fellowship Commission it "should be subject to the same record keeping standards as an agency that makes its own personnel determinations"); *R.R. v. Dept. of the Army*, 482 F. Supp. 770, 773 (D.D.C. 1980) (allegations that Army's refusal to correct its medical records caused Veterans Administration to deny plaintiff full benefits).

[4] Although the bill that passed Congress and became the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1897, was labeled as the Senate bill (S. 3418), the statute's substance is principally that of the House bill (H.R. 16373). *Doe v. General Services Administration*, 544 F. Supp. 530, 533 (D. Md. 1982); *Florida Medical Association, Inc. v. Dept. of Health, Education & Welfare*, 479 F. Supp. 1291, 1305-1306 (M.D. Fla. 1979). "The Privacy Act is essentially a House carcass under a Senate hide." *Florida Medical Association*, 479 F. Supp. at 1305. As a result, the House Report, rather than the Senate Report, is often the best barometer of Congressional intent. *Id.* at 1306. In any event, the Senate Report is consistent with the House Report on the meaning of "determination":

> The standards of accuracy, completeness, and timeliness, as well as relevancy are directed to the quality of the information in an individual's own file. The section thus looks to a double-pronged consideration, first to the authorized needs of the agency, and second, to the scope of the administrative need for information *in order to made a decision on that individual.*

S. Rep. No. 1183, 93d Cong., 2d Sess. 50 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6916, 6965 (emphasis supplied).

by third parties, to the BATF, which would then decide whether to hire plaintiff. *Cf. Zeller v. United States*, 467 F. Supp. 487, 502 (E.D.N.Y. 1979) (press release issued by agency was not used by agency in making decisions adversely affecting plaintiff).

In addition, the statute requires agencies disseminating its records to anyone *other than an agency* to make reasonable efforts to ensure the records' accuracy and completeness. 5 U.S.C. § 552a(e)(6) (emphasis supplied).[5] The specific exclusion of agencies from section (e)(6) and the lack of provisions elsewhere in the Privacy Act on agency-to-agency transfers of records indicate that Congress did not intend the obligations of section (e)(6) to apply to the sending agency when records are sent from one agency to another.

In light of the statute's language, structure and legislative history, we interpret section (e)(5) to mean that when one federal agency sends records to another agency to be used by the latter in making a decision about someone, the responsibility for ensuring that the information is accurate, relevant, timely and complete lies with the receiving agency—the agency making the "determination" about the person in question—not the sending agency.[6] Guidelines drafted by the Office of Management and Budget ("OMB") shortly after the Privacy Act be-

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[5] Section (e)(6) provides that agencies shall

> prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section [Freedom of Information Act requests], make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes.

[6] We also note that the beginning phrase of section (e)(5), "maintain all records," is broad enough to include information received from other agencies. "Record" is defined as "any item, collection, or grouping of information about an individual that is maintained by an agency." 5 U.S.C. § 552a(a)(4). And "maintaining" a record includes collecting it. 5 U.S.C. § 552a(a)(3).

came law—guidelines still in effect today—are in accord with this interpretation. 40 Fed. Reg. 28,948, 28,964-28,965 (July 9, 1975) (Privacy Act Implementation: Guidelines and Responsibilities).[7] *See also Clarkson v. Internal Revenue Service*, 678 F.2d 1368, 1377 (11th Cir. 1982); Note, *The Privacy Act of 1974: An Overview*, 1976 Duke L. J. 301, 315.

We recognize that our construction of section (e)(5)—compelled, we think, by the statutory language and its history—creates some practical problems for litigants. For example, after the FBI was granted summary judgment on Perry's section (e)(5) claim, Perry voluntarily dismissed his section (e)(5) claims against the remaining defendants because he felt they would provide little in the way of meaningful relief; the FBI would retain its report and the right to circulate it regardless of the outcome of the section (e)(5) claims against the other defendants. Appellant's Brief at 3. Besides the limited utility of a pyrrhic victory against the other agencies, it might be difficult for a plaintiff to win a section (e)(5) suit against a receiving agency. Section (e)(5), after all, requires only that an agency act reasonably in ensuring that the information it relies on in making employment decisions is accurate. It might be hard to argue, for example, that it is unreasonable for an agency to rely on a report from the nation's leading crime-fighting agency, especially when the FBI itself is in the best position to validate the information. But Congress was entitled to

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[7] The OMB's authority to promulgate guidelines for implementing the Privacy Act is found in § 6 of the Act, Pub. L. No. 93-579, 88 Stat. 1896, 1909 (1974). The guidelines were promulgated, contemporaneously with the Act's passage, by the OMB, the agency charged with overseeing implementation of the Act's requirements, and accordingly are entitled to deference in interpreting the statute's meaning. *Albright v. United States*, 631 F.2d 915, 919 n.5 (D.C. Cir. 1980); *Bartel v. Federal Aviation Administration*, 725 F.2d 1403, 1408 n.9 (D.C. Cir. 1984); *see generally United States v. Markgraf*, 736 F.2d 1179, 1183-1184 (7th Cir. 1984), petition for certiorari filed, 53 U.S.L.W. 3326 (No. 84-572).

draft the Privacy Act this way, and any resolution of these problems must come from Capitol Hill, not the courts.

III.

The Privacy Act prohibits the release of information about a person, with exceptions not relevant to this case, unless the individual consents to the disclosure in writing. 5 U.S.C. § 552a(b). Perry's second statutory claim is that he did not consent to the release of the FBI report. He contends that the reference to "police and criminal records" in the release he signed is limited to records of arrests and convictions. The phrase "police and criminal records," however, is broader in scope than arrest and conviction records. Information retrieved, as here, from the FBI's criminal investigative files fits comfortably within the category of criminal records. Although not as detailed as the waiver signed by the plaintiff in *Thomas v. Veterans Administration*, 467 F. Supp. 458, 460 n.4 (D. Conn. 1979), the release Perry signed is not so vague or general that it is questionable whether he knew what he was authorizing or whether the FBI knew what documents it could lawfully release to the BATF. *Cf., e.g.*, the boilerplate release in *Doe v. General Service Administration*, 544 F. Supp. 530, 531-532 (D. Md. 1982). The release in this case is sufficient to comply with § 552a(b); Perry consented to the release of the information found in the FBI report.

IV.

The most troublesome issue in this case is plaintiff's claim that the disclosure of the FBI report implicated a liberty interest protected by the Fifth Amendment. No constitutional claim would be stated if Perry alleged only that the FBI report defamed him, *Paul v. Davis*, 424 U.S. 693, or if he claimed only that as a result of the report he did not receive a particular government job, *Cafeteria & Restaurant Workers, Local 473 v. McElroy*, 367 U.S. 886. But Perry has alleged that the FBI is deliberately

attempting to deny him employment within the federal government in a law enforcement position; the FBI, he claims, has willfully and intentionally made it impossible for him to get a federal law enforcement position and virtually impossible to obtain similar work with state or local government agencies. Plaintiff also claims that the allegations in the report are false, an essential element of his liberty interest claim. *Codd v. Velger*, 429 U.S. 624, 627-628 (per curiam).

While most of the liberty interest cases involve individuals who have been dismissed, *e.g., Codd v. Velger; Board of Regents v. Roth*, 408 U.S. 564; *Munson v. Friske*, No. 83-1446, slip op. (7th Cir. Jan. 29, 1985), the plaintiff here was never hired. In *Larry v. Lawler*, 605 F.2d 954 (7th Cir. 1978), this Court held that a liberty interest could be implicated by the manner in which a job applicant is turned down.[8] Larry applied to the Civil Service Commission to be put on a list of eligible applicants for federal jobs. The Commission rated him ineligible (because of his employment record and habitual use of alcohol); the effect of this finding was to bar Larry from federal employment for a period of up to three years. 605 F.2d at 956. We applied the two-part analysis developed in *Board of Regents v. Roth* to determine if Larry had a protectable liberty interest: a liberty interest is implicated when (1) charges are made against an individual which might seriously damage his standing and associations in the community; or (2) the state imposes on an individual a stigma or other disability foreclosing his freedom to take

[8] A more recent case reaching a similar conclusion is *Bartel v. Federal Aviation Administration*, 725 F.2d at 1414-1415 (employee given temporary GS-12 job after being denied permanent GS-13 position because of alleged misconduct in prior FAA job); *see also Doe v. United States Civil Service Comm'n*, 483 F. Supp. 539 (S.D.N.Y. 1980) (applicant for White House fellowship turned down after investigation discovered allegations of theft about plaintiff).

advantage of other employment opportunities.[9] *Id.* at 957 (quoting *Roth*, 408 U.S. at 573-574). *See also Munson*, slip op. at 13-14. We decided that the second situation existed in Larry's case, even though the Commission's findings were not made public:

> [T]he federal government is composed of many different agencies and departments, all of which could obtain the information under various circumstances. In effect, Larry has been stigmatized throughout the entire federal government. He is deprived of the opportunity to work in any capacity for any branch of the government.

Id. at 958. *See also Velger v. Cawley*, 525 F.2d 334, 336 (2d Cir. 1975), reversed on other grounds *sub nom., Codd v. Velger*, 429 U.S. 624 (per curiam); *Doe v. United States Civil Service Comm'n*, 483 F. Supp. at 570-571.[10]

Perry's case is distinguishable from *Larry* in that Perry is not absolutely barred from federal employment,

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[9] In *Roth*, the Supreme Court gave several examples of statements fitting within the first category: accusations of dishonesty or immorality or statements damaging one's name, reputation, honesty or integrity. 408 U.S. at 573. While the statements in the FBI report arguably accuse plaintiff of criminal conduct (impersonating law enforcement officers, *see* 18 U.S.C. §§ 912, 913), he does not contend that he is covered by the first branch of *Roth*. He argues on appeal only that the stigmatizing nature of the FBI report has made it impossible to get a job in the law enforcement field.

[10] This *Doe* case is analogous to the instant action. After the plaintiff applied to be a White House fellow, the Fellowship Commission asked the Civil Service Commission ("CSC") to investigate her background. Two people told the investigators that Doe was a thief. Doe was not selected to be a fellow. Like the FBI report at issue here, the CSC report was available for use by other federal agencies. 483 F. Supp. at 570-571. The district court (Tenney, J.) ruled that the CSC deprived Doe of a liberty interest without due process and ordered that Doe be given an opportunity to clear her name.

but the practical effect of the FBI report is close enough to the employment bar in *Larry* to convince us that Perry is entitled to the due process protections provided by the Fifth Amendment. To begin with, any federal agency considering Perry for a law enforcement job will undoubtedly check plaintiff's FBI files. Perhaps the allegations in the report would matter less if Perry did not want to work in law enforcement, but the Constitution protects the liberty to follow the profession of one's choosing. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238; *Lawson v. Sheriff of Tippecanoe County*, 725 F.2d 1136, 1138 (7th Cir. 1984); *see Meyer v. Nebraska*, 262 U.S. 390, 399. And in any event, the government informs us in its brief that a check of the FBI's investigative files is mandatory for all of the federal government's prospective civilian employees. Appellee's Brief at 22 (citing Exec. Order No. 10,450, § 3(a) (April 27, 1953) and Federal Personnel Manual, Chap. 736, subchap. 1, § 1-2e). This means that the effect on Perry is almost identical to the effect on Larry we found protected by the Due Process Clause; while Perry is not barred from all federal employment, the seriousness of the report's accusations makes it extremely unlikely that anyone reading the report would hire him, particularly in the law enforcement field.[11] Perry, like Larry, has been stigmatized throughout the federal government.

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[11] Some of the liberty interest cases involve legal barriers to employment, *e.g.*, *Truax v. Raich*, 239 U.S. 33 (statute limiting the number of aliens an employer could hire); *Larry v. Lawler*, or suggest that such barriers are a prerequisite to maintaining a liberty interest claim, *Adams v. Walker*, 492 F.2d 1003, 1008-1009 (7th Cir. 1974). Recent decisions of this Court, however, recognize that a liberty interest may be implicated even though there is no absolute bar to future employment. *See Munson v. Friske*, No. 83-1446, slip op. at 14 (7th Cir. Jan. 29, 1985) (a liberty interest is implicated where charges result in permanent exclusion from or protracted interruption of employment); *Lawson*, 725 F.2d at 1139 (quoted *infra*); *Smith v. Board of Education of Urbana*, 708 F.2d 258, 265 (7th Cir. 1983) (the Constitution requires that school board members "not make public statements so critical of plaintiffs' coaching abilities that

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Another factor in our decision in *Larry* was the length of time during which Larry was barred from all federal employment: three years. In contrast, the FBI report on Perry has been in his investigative file—and thus required to be reviewed by all prospective federal employers—for nearly nine years. The seemingly permanent existence of this report combined with the seriousness of its accusations convince us that the due process guarantees of the Fifth Amendment must come into play. The scope of the denial of employment opportunities—when viewed in terms of its practical effect—is only slightly narrower than the absolute ban in *Larry*, but the duration of this denial is, as of this writing, nearly three times greater.

It is true that the agencies that refused to hire Perry theoretically could have given him a job in spite of the FBI report or might not have hired him anyway.[12] But a realistic appraisal of the effect of the report leads inexorably to the conclusion that a prospective employer will not hire the subject of a report containing allegations of misbehavior as serious as those present here. The allega-

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[11] *continued*

it would be virtually impossible for them to find new employment in similar coaching positions"); *see also Lipp v. Board of Education of Chicago*, 470 F.2d 802, 805 (7th Cir. 1972) (due process might require a hearing if government action "were to diminish [plaintiff's] chances of obtaining employment significantly") (quoted with approval in *Hadley v. County of Du Page*, 715 F.2d 1238, 1247 (7th Cir. 1983), certiorari denied, 104 S. Ct. 1000).

[12] In fact, affidavits from two BATF officials (executed nearly five years after the BATF withdrew its tentative offer of employment to Perry) state that even without the FBI report the agency would not have hired Perry on the basis of its own independent investigation. The record contains no similar affidavits from officials of the three other federal agencies that refused to hire Perry. There is no evidence that these agencies conducted independent investigations of plaintiff's background or independently attempted to verify the information contained in the FBI report.

tions in the FBI report go far beyond making Perry "somewhat less attractive to some other employers," *Roth*, 408 U.S. at 574 n.13, or forcing Perry "down a few notches in the professional hierarchy," *Munson v. Friske*, slip op. at 14, neither of which would implicate a liberty interest. Rather, the report contains allegations of serious misconduct reflecting upon Perry's honesty and mental stability and indicates that he is unfit to serve as a law enforcement officer. *Cf. Greene v. Finley*, 749 F.2d 467, 472 (7th Cir. 1984); *Krause v. Small Business Administration*, 502 F. Supp. 1332, 1339 (S.D.N.Y. 1980). The FBI report has effectively deprived Perry of the opportunity to work for the federal government in any capacity or as a law enforcement officer anywhere. When the government refuses to hire someone because of accusations "likely to make him all but unemployable in the future . . . the consequences are so nearly those of formally excluding him from his occupation that the law treats the state's action the same way, and insists that due process be provided." *Lawson*, 725 F.2d at 1139.[13] *See generally Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1108-1112 (D.C. Cir. 1985).

Justice Jackson's reminder of the importance of the interest at stake in cases like this is particularly apropos to the law enforcement profession. "To be deprived not only of present government employment but of future opportunity for it certainly is no small injury when government employment so dominates the field of opportunity." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 185 (Jackson, J., concurring). The Second Circuit, per Justice Clark, had similar thoughts in *Velger v. Cawley*, 525 F.2d at 336, when it discussed the devastating effect that an accusation of attempted suicide

[13] It does not matter that the report contained allegations of third parties rather than assertions of fact by the FBI (the report's first page stated that it "contains neither recommendations nor conclusions of the FBI"). It is the effect of the FBI report on Perry's future employment prospects with which we are concerned, not the sources of the statements contained in the report.

in a discharged probationary policeman's personnel file could have on the officer's future employment prospects:

> Police authorities must, therefore, exercise the greatest degree of care in dealing with probationary officers to make certain not only that their discharge decisions are just but also that their reasons are kept confidential. Here New York City admits that it grants ready access to its confidential personnel files to all governmental police agencies. In a case like the present one this could have the effect of closing the public sector to the probationary police dischargee and depriving him of employment in the largest and most desirable segment of his profession. The same result, in reality, is true in the private sector because New York City answers all inquiries for permission to see personnel files with the suggestion that inspection will be permitted with the consent of the dischargee. The dischargee is then placed "between the devil and the deep blue sea"; he loses whatever his choice. Who would employ an applicant who refused to give authorization? Who would employ one who gives authorization but whose file suggests that he made an "attempt" at suicide?[14]

See also Bartel v. Federal Aviation Administration, 725 F.2d 1403, 1415 (D.C. Cir. 1984) (denial of right to be considered for government employment in aviation may have effectively abridged freedom to take advantage of

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[14] This explains why there can be a due process violation even though plaintiff consented to the release under the Privacy Act. *See* Part III *supra*. If Perry did not consent to the release of the information found in the FBI's files, he could not be hired by the federal government because a check of the FBI's investigative files is mandatory. And once Perry consented and his prospective employer read the FBI report, he almost certainly would not be hired. Either way, law enforcement employment opportunities for Perry are effectively foreclosed. *See Pollock v. Baxter Manor Nursing Home*, 706 F.2d 236, 242 (8th Cir. 1983) (McMillian, J., dissenting), *modified*, 716 F.2d 545 (8th Cir. 1983) (per curiam); *compare Green v. Board of School Commissioners of Indianapolis*, 716 F.2d 1191, 1193 (7th Cir. 1983).

government employment); *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980) (due process guarantees apply when government barred contractor from virtually all government work, effectively putting contractor out of business); *cf. Cleveland Board of Education v. Loudermill*, 53 L.W. 4306, 4308 (U.S. Sup. Ct. 1985, recognizing the severity of depriving a person of the means of livelihood).

V.

Because the FBI report contains allegations of behavior that effectively foreclose Perry's chances of being employed in the law enforcement field, or being employed by the federal government in any capacity, the report implicates a liberty interest within the meaning of the Fifth Amendment. Whether the FBI has deprived Perry of a liberty interest without due process is left to the district court on remand; the district court never reached the question of what process was due plaintiff since it concluded that the report did not implicate his liberty interest. We would prefer to have the District Judge's views on the issue before reaching the question here. Likewise, we leave to the District Judge the appropriate relief should a due process violation be found. We would, however, like to provide some guidance for the proceedings on remand.

The question of what process is due has two components in the context of this case: (1) whether the FBI has already provided Perry with sufficient opportunity to refute the allegations contained in the report (i.e., whether the government complied with due process); and, if not, (2) an opportunity for Perry to clear his name (i.e., a remedy for the constitutional violation). *See Codd v. Velger*, 429 U.S. at 627; *Roth*, 408 U.S. at 573 n.12. There are several possible arguments that Perry's due process rights have not been violated, keeping in mind that "[a]n essential principle of due process is that a deprivation of

life, liberty or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Loudermill*, 53 L.W. at 4308 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313). First, the government argues in a footnote that Perry had an opportunity to dispute the allegations in an "informal give-and-take," *see Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 86; *Goss v. Lopez*, 419 U.S. 565, 584, when he talked on the telephone with two BATF officials after the agency decided not to hire him. A second possibility is that Perry's efforts to clear his record through the United States Civil Service Commission ("CSC") provided him with an adequate opportunity to contest the accusations in the report.[15] *Cf. Bush v. Lucas*, 103 S. Ct. 2404; *Bartel v. Federal Aviation Administration*, 725 F.2d at 1415. A third alternative is that the remedies available under the Privacy Act to amend one's records satisfy due process.[16] Of course we express no opinion on any of these options nor do we wish to foreclose the district court from considering others; rather, we mention

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[15] The record contains a 1978 letter from the CSC to Perry informing him of a "favorable determination" in his case. Plaintiff's brief states that the CSC conducted an intensive investigation into plaintiff's suitability for federal employment and ordered the restoration of his name to employment eligibility rosters. Our review of the record has not disclosed the scope of the CSC investigation or the extent to which its results were disseminated to various federal agencies.

[16] In 1978 plaintiff sent a letter to William Webster, Director of the FBI, requesting that his file be amended pursuant to 5 U.S.C. § 552a(d)(3). Webster refused to expunge the material identified by Perry, explaining that retention of the information did not violate the Privacy Act and that it was "relevant and necessary" for the FBI to "retain our later information concerning you to supplement our record of your 1968 FBI employment." Perry's letter challenging the accuracy of the information was placed in his file and will be provided, according to Webster's letter, to anyone reading the file. *See* § 552a(d)(3).

them only to illustrate the issues that should be considered on remand.

Similarly, if the district court concludes that Perry's due process rights were violated, the court should fashion a remedy that is consistent with the principle that due process is a flexible concept whose procedural protections depend on the peculiar circumstances of each case. *Morrissey v. Brewer*, 408 U.S. 471, 481. Due process requires an opportunity to be heard at a meaningful time and in a meaningful manner, *Mathews v. Eldridge*, 424 U.S. 319, 333, but application of that standard in a particular case depends upon consideration of three factors: the private interest affected; the risk of an erroneous deprivation; and the government's interest, including the financial and administrative burdens additional procedures would require. *Id.* at 335; *see Doe v. United States Dept. of Justice*, 753 F.2d at 1112-1114; *Larry v. Lawler*, 605 F.2d at 959-963; *see generally Krause v. Small Business Administration*, 502 F. Supp. at 1339-1342; *Doe v. United States Civil Service Comm'n*, 483 F. Supp. at 572-575. The district court, as fact-finder, is in a better position than this Court, on the record that now exists, to assess these factors.

We wish to emphasize that we are not holding that the FBI must provide all job applicants with an opportunity to refute allegations contained in FBI reports when the reports are transmitted to a prospective employer. Such a requirement could significantly impede the FBI's principal function of investigating criminal activity. Rather, a meaningful opportunity to be heard must be given only when the FBI report implicates a liberty interest. This means that cases such as the one before us will arise only when (1) the subject of the report contests the truthfulness of the information found in the report, *Codd v. Velger*, 429 U.S. at 627-628; and (2) the report—made public or easily available to prospective employers, *see Bishop v. Wood*, 426 U.S. 341, 348—contains statements falling within one of the two categories identified in *Roth*, 408 U.S. at 573-574. *See supra* at 9-10. The paucity of

reported decisions involving job applicants asserting deprivation of a liberty interest suggests to us that such cases will be few and far between.

VI.

One other issue warrants discussion. It is not clear from the briefs whether Perry is appealing the ruling on his due process claim against the FBI only or against the other defendants as well. If he is appealing the claim as to all the defendants, the judgment is affirmed as to all but the FBI. Assuming the falsity of the report, the FBI has deprived Perry of a liberty interest because it compiled the report and is in a position to disseminate it—indeed, is required to disseminate it—whenever a federal agency is considering hiring Perry. Moreover, it is conceivable that state and local law enforcement agencies as well check the FBI's files before hiring new personnel.[17] This is not true for the other agency defendants. They have not hired Perry but they have not done anything to make it impossible, or virtually impossible, for plaintiff to work in law enforcement. The defendant agencies have refused to hire Perry for particular positions, but they have not deprived him of the opportunity to follow his chosen profession.

VII.

Accordingly, we reverse the district court with respect to plaintiff's due process claim against the FBI, affirm the judgment in favor of the FBI on plaintiff's Privacy Act claims, and affirm the judgment in favor of the remaining defendants on plaintiff's due process claim. The case is remanded for further proceedings consistent with this opinion.

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[17] In fact, plaintiff states in an affidavit that BATF agent Potter told him that he should look for work in the private sector because Perry would never again obtain a law enforcement job.

WOOD, *Circuit Judge*, dissenting. The majority opinion is a very fair examination of all the issues. I fully concur in the affirmance of the Privacy Act issues, but I am not quite convinced on the due process issue, and therefore respectfully dissent, but only to that extent.

As the majority opinion itself points out, this case may be distinguished from *Larry v. Lawler*, 605 F.2d 954 (7th Cir. 1976) (Wood, J., dissenting) because there is no broad and absolute ban barring Perry from all federal employment. Nevertheless, the majority considers *Larry* to be close enough to be controlling. I do not because the majority stressed in *Larry*, 605 F.2d at 958 that "It must be remembered that Larry has not merely been denied a particular position within the government; he has been totally debarred from all federal employment for up to three years." After that three years was up, then it would also be necessary for Larry to convince the United States Civil Service Commission of his rehabilitation and fitness for appointment in a new determination. 5 C.F.R. § 731.303 (1984).

Perry faces no absolute federal employment ban although the majority speculates that the FBI information "makes it extremely unlikely" that anyone would hire him for a federal position. Perry, however, did subsequently apply to the Commission to be placed on the list of eligible applicants for employment consideration by the various agencies and departments within the federal government, and was successful. But Perry nevertheless continues to complain about his failure to be hired by four particular federal law enforcement agencies.

Perry sought law enforcement positions with the Bureau of Alcohol, Tobacco and Firearms (BATF), United States Marshals Service (USMS), Department of Agriculture (DOA), and the Internal Revenue Service (IRS). All

four agencies rejected Perry's application. The blame for those rejections is placed on the Federal Bureau of Investigation (FBI) which upon request from BATF, but only after Perry had authorized the release of information contained in police and criminal records, sent the requested information to BATF.

The FBI personnel background information was contained in a five-page memorandum which was excised before distribution to BATF. That memorandum clearly states, however, that what it contains constitutes neither recommendations nor conclusions of the FBI. The memorandum advises that Perry was employed for several months as a clerk by the FBI when he was 18 years old. The reason for his brief tenure is not given. The information the memorandum contains undoubtedly could be expected to be of interest to any federal law enforcement agency considering Perry for employment.

For example, the first bit of information comes not from some unnamed informant of questionable reliability, but from Perry's own father, Reverend Perry, who advised the FBI that his son, Perry, had told him that he had been required to carry a weapon when he was a clerk for the FBI, and that even though he was no longer employed by the FBI there was still the possibility that he would be called upon for a covert assignment. Perry's quarrel should be with his father. Anyone with any knowledge of the FBI must realize that its 18 year old clerks without agent training are not authorized to carry guns.

An informant whose name was excised advised the FBI that he overheard Perry in a bar claim to be a federal officer and that he had served a subpoena in a federal investigation. As might be expected, the United States Attorney for the Northern District of Illinois declined prosecution under the impersonation statute, but the United States Attorney did request that Perry be interviewed and admonished. It does not appear in the memorandum that Perry did any more than talk in a bar about being a federal officer. The report does not allege

that Perry served any subpoena as a federal officer. To violate the statute a person must in fact act as a federal officer or obtain something of value. 18 U.S.C. § 912. Perry was admonished and the memorandum states that Perry "vehemently denied ever representing himself as a Federal Officer."

Another sample item again from an informant indicates that Perry had flashed a United States Marshal's badge in a bar, and was armed. The United States Attorney likewise declined prosecution on this charge. It was only talk as no actual use was made of the badge. Being armed would ordinarily be a local matter. Another item reported Perry used a red light and siren in his car to stop other vehicles for some reason and that it cost him his job on the Deerfield Police Department. A local police agency reported that Perry while driving was stopped by one of its officers. A red light and siren were noted. No charges were filed by the officers, but the officers confiscated a blackjack and a tear gas pen with cartridges. Again the report contained Perry's explanation that the siren was merely a car alarm, and that he was a dispatcher for the Illinois State Police. Apparently he was a dispatcher for a few months, but resigned. It was reported by the Illinois State Police that Perry would not be eligible for rehire because of poor attitude, failure to obey orders, and allegedly receiving personal gasoline discounts for official favors as a dispatcher. It was also reported that Perry had a state trooper-style hat he wore while driving on the toll road. He was investigated by the state for impersonating a state trooper, but no disposition is shown. Perry was also hired as a dispatcher by a local police department, but for some undisclosed reason that lasted only one night.

BATF, like the other federal agencies, is a sophisticated federal law enforcement agency. BATF did not rely on the FBI information, but conducted its own

independent background investigation of Perry and then declined to hire him. Most of what was contained in the FBI memorandum, even without the names of the informants except for Perry's father, was easily subject to verification since most of it directly involved other police agencies. Perry knew where he had worked, why employment was terminated, and when and for what he had been stopped, questioned, and admonished. The information was clearly designated not to be construed as a recommendation nor a conclusion of the FBI. The information was presented in a straightforward manner without editorial comment, and even contained several direct denials by Perry. Had the memorandum gone to some private source not capable of evaluating that type of raw information nor having the capability of checking it out, we would have a different case. Nor does the report directly accuse Perry of an act of dishonesty that might be criminal. Perry's own barroom talk is not sufficient. He was not, for instance, labeled as an embezzler or a thief. Nor is there anything in the report to suggest any immorality whatsoever. Those accusations are examples cited in *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) as implicating a liberty interest. The memorandum information about Perry approaches nothing involving moral turpitude.

There is a pattern of conduct, however, which emerges in the reported items which fully justified dissemination by the FBI to serve as leads but obviously requiring further verification by any interested law enforcement agency. But putting all that impersonation conduct aside, the Illinois State Police evaluation of Perry after termination of his employment with that agency stating that Perry would not be rehired because of poor attitude, failure to obey orders, and misuse of his job for personal gain is classic employment information not within any police or criminal record category. That information alone, also easily verifiable, would justify employment rejection by a federal law enforcement agency making all the other items in the FBI memo surplusage. It is difficult to imagine that a federal law enforcement agency would

hire an employee who would not be rehired for good reason by a state law enforcement agency. Perry does not deny he was hired by the Illinois State Police and should have expected that his former employer would give an evaluation of him separate from any FBI report.

For the FBI not to have passed on the pertinent information concerning closed investigations and investigative leads to another federal law enforcement agency contemplating hiring Perry as an agent would have been, as I see it, a dereliction. Therefore, I do not see it as a due process violation when the FBI did what was sensible and practical. There was no federal employment ban imposed on Perry by regulation. The agencies were free to make their independent choices and exercise their individual discretions. Perry was given the opportunity to dispute the information directly by letter, by phone, and in person and did so. Any additional due process requirements would constitute an unnecessary burden on federal law enforcement hiring practices. It is better for a federal law enforcement agency not to hire than to be later unpleasantly surprised by a new employee's unstable conduct which could have serious public safety consequences.

But, even if it is to be considered a possible due process violation, Perry's interviews, denials, and his use of the FBI procedures for labeling the information in the FBI file as disputed together with his pursuit of a U.S. Civil Service Commission remedy provided all the due process he deserved. Federal law enforcement positions are too critical and sensitive to make it unnecessarily difficult for one federal law enforcement agency to pass pertinent investigative leads to another federal law enforcement agency. On balance, the risk to public safety far outweighs the possibility that some potential employer might rely on the mere bits of information in the FBI file without more in rejecting an otherwise qualified applicant. The information in the file did not constitute allegations, only unverified information easily recognized by a federal law enforcement agency for no more than it

was. Even a possible chilling of Perry's federal employment by an adverse reflection on his reputation is not an employment ban and does not amount to a deprivation of liberty. *Paul v. Davis*, 424 U.S. 693 (1976). A mere failure to hire, considering all the circumstances of this case, does not meet the "stigma plus" standard as characterized in *Colaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976), *cert. denied*, 430 U.S. 960 (1977).

Therefore, in part, I respectfully dissent.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—4-11-85—450

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RIXSON PERRY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 77 C 2466
	)	
FEDERAL BUREAU OF INVESTIGATION, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Defendants' Motion for Summary Judgment, Plaintiff's Motion for Summary Judgment, and Defendants' Motion to Strike

I.

Plaintiff Rixson M. Perry brings this action against several federal agencies alleging that he was denied federal employment because of the

wrongful dissemination of derogatory information collected by defendant the Federal Bureau of Investigation. The FBI's records concerning plaintiff were compiled during the course of an investigation into alleged acts of impersonation of an officer by plaintiff. Plaintiff's four-count third amended complaint alleges, inter alia, that he was denied law enforcement positions with defendant the United States Marshals Service (the "Marshals Service") as a result of the FBI's dissemination of its information concerning plaintiff to those agencies and with defendants the Internal Revenue Service (the "IRS") and the Department

of Agriculture (the "DOA") as a result of the BATF's dissemination of the same information to those agencies. The four counts of plaintiff's third amended complaint each challenge one of plaintiff's four above described rejections from federal employment positions. Each count sets forth three causes of action. The first cause of action of each count is that the FBI's retention of the report coupled with its failure to amend the report is violative of 5 U.S.C. §552a (e) (1), (2), (5), and (6). The second cause of action of each count alleges that the dissemination of the FBI report by the FBI and the BATF was unauthorized and done with an intent to

deny plaintiff employment and, therefore, violative of 5 U.S.C. §552a (b) and (e)(6) and plaintiff's Fifth Amendment rights. The third cause of action of each count alleges that the FBI and the BATF failed to make an adequate accounting of their alleged disclosures of the report as required by 5 U.S.C. §552a (c).

Since some of the causes of action were dismissed by the Court in Perry I and Perry II Memorandum Opinions, the only issues pending in this litigation are plaintiff's Due Process cause of action against the BATF, IRS, DOA, the Marshals Service, and the FBI, and plaintiff's (e)(5)

claim under the Privacy Act against the same five defendants.

Today the Court is ruling on three motions: (1) defendant's motion for summary judgment on the plaintiff's constitutional claim under all of the counts and his statutory claim under all of the counts; (2) defendants' motion to strike certain paragraphs from Rixson Perry's June 26, 1981 affidavit; and (3) plaintiff's motion for summary judgment on his Due Process claim under all of the counts.

The Court denies in its entirety defendants' motion to strike certain paragraphs of plaintiff's affidavit. The Court denies plaintiff's

motion for summary judgment on his Due Process claim and grants the defendants' motion for summary judgment on the Due Process claim.

The Court grants defendant FBI's motion for summary judgment on the statutory claim and denies the other defendants' motion for summary judgment on the (e)(5) claim under the Privacy Act of 1974, 5 U.S.C. §552a.

Thus, the FBI is dismissed as a defendant and all of the causes of action are dismissed as to the BATF, the IRS, the Marshals Service, and the DOA with the exception of the (e)(5) claim.

II.

In Perry I (the Court's Memorandum Opinion of May 21, 1980) and in Perry II (the Court's Memorandum Opinion of January 15, 1981), this Court held that "the stigmatizing nature of the FBI report coupled with its actual or threatened dissemination throughout the federal law enforcement field and the consequent foreclosure of employment in that field implicated plaintiff's constitutionally protected liberty interest. (See Perry II at 7.) After considering the authorities and argument presented by both parties and after conducting its own research of the precedents of Procedural Due Process,

this Court reverses its holding and now holds that the dissemination of the report compiled pursuant to an FBI investigation into alleged criminal activity of the plaintiff does not implicate any liberty interest of the plaintiff.

Although the FBI report of May 12, 1976 contained statements that were critical of Mr. Perry's character and personality, the FBI did not adopt the statements made by various third parties as its own allegations, conclusions, or opinions. The only act the FBI performed was to interview people who made allegations about the plaintiff. The cover of the FBI report

clearly and unequivocally states that it "contains neither recommendations nor conclusions of the FBI." (See the first page of the FBI report on Rixson Perry, dated May 12, 1976). Thus, this Court finds that the preparation and the dissemination of the FBI report by the FBI to the BATF and the Marshals Service and the dissemination of the information contained in the FBI report by the BATF to the IRS and the DOA (which plaintiff alleged occur) did not "stigmatize" the plaintiff and therefore did not implicate the plaintiff's "liberty" interest within the standard for defining liberty set forth in the Roth/Davis line of cases. See Board of Regents v. Roth,

408 U.S. 564, 573 (1972); Paul v. Davis, 424 U.S. 693, 701 (1976); Larry v. Lawler, 605 F.2d 954, 959 (7th Cir. 1978).

III.

The only remaining claim under the Privacy Act is whether section (e)(5) was violated. Section (e)(5) states: "Each agency that maintains a system of records shall maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." Before the Court is each

defendant's motion for summary judgment as to each of the defendants. Summary judgment is denied, with the exception of the FBI, since there is a genuine factual dispute about whether the other named defendants made a reasonable effort to ensure that the information contained in the FBI report was sufficiently accurate, relevant, timely, and complete to enable them to make a fair and meaningful determination as to whether Mr. Perry should be granted or denied employment. Accordingly, the Court will hold a hearing in order to determine whether each defendant conducted a reasonable investigation into

the allegations contained in the FBI report.

The defendant FBI's motion for summary judgment is granted, since the FBI did not make any determination about the plaintiff. The language of (e)(5) is unambiguous. The agency must have made a determination about an individual and the act of transferring a record from one agency to another is not a determination. See Note, The Privacy Act of 1974: An Overview, 1976 Duke L. Journal 301, 315 (1976).

In conclusion, the Court grants defendant FBI's motion for summary judgment as to all of plaintiff's

claims against it. Accordingly, the FBI is hereby dismissed from this action.

The Court grants summary judgment in favor of all of the other defendants on the Due Process claim, but denies the summary judgment motion as to the section (e)(5) claim under the Privacy Act. Consequently, this Court will hold a hearing in order to determine whether each remaining defendant -- BATF, IRS, DOA, and the Marshals Service -- made a reasonable investigation into the truth or falsity of the allegations contained in the FBI report before each law enforcement agency decided to deny plaintiff employment.

The Court also denies defendants' motion to strike portions of Perry's Affidavit.

An appropriate order shall enter.

ENTER:

_____
Judge

DATED: _____

Appendix D

JUDGMENT ORDER
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 23, 1986

Before

Hon. Walter J. Cummings, Chief Judge
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge
Hon. Richard A. Posner, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge

No. 82-1136	]	Appeal from
RIXSON MERLE PERRY,	]	the United
Plaintiff-Appellant,	]	States District
v.	]	Court for the
FEDERAL BUREAU OF	]	Northern District
INVESTIGATION, et al.,	]	of Illinois,
Defendants-Appellees,	]	Eastern Division
	]	No. 77 C 2466
	]	ABRAHAM L.
	]	MAROVITZ, Judge

This cause was reheard en banc on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was reargued by counsel only on the liberty interest issue discussed in Parts IV - VII of the panel opinion issued April 11, 1985.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court on the liberty interest issue is hereby AFFIRMED, in accordance with the opinion of this Court filed this date.

(2)

Supreme Court, U.S.
FILED
JUL 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1745

In the Supreme Court of the United States

OCTOBER TERM, 1986

RIXSON MERLE PERRY, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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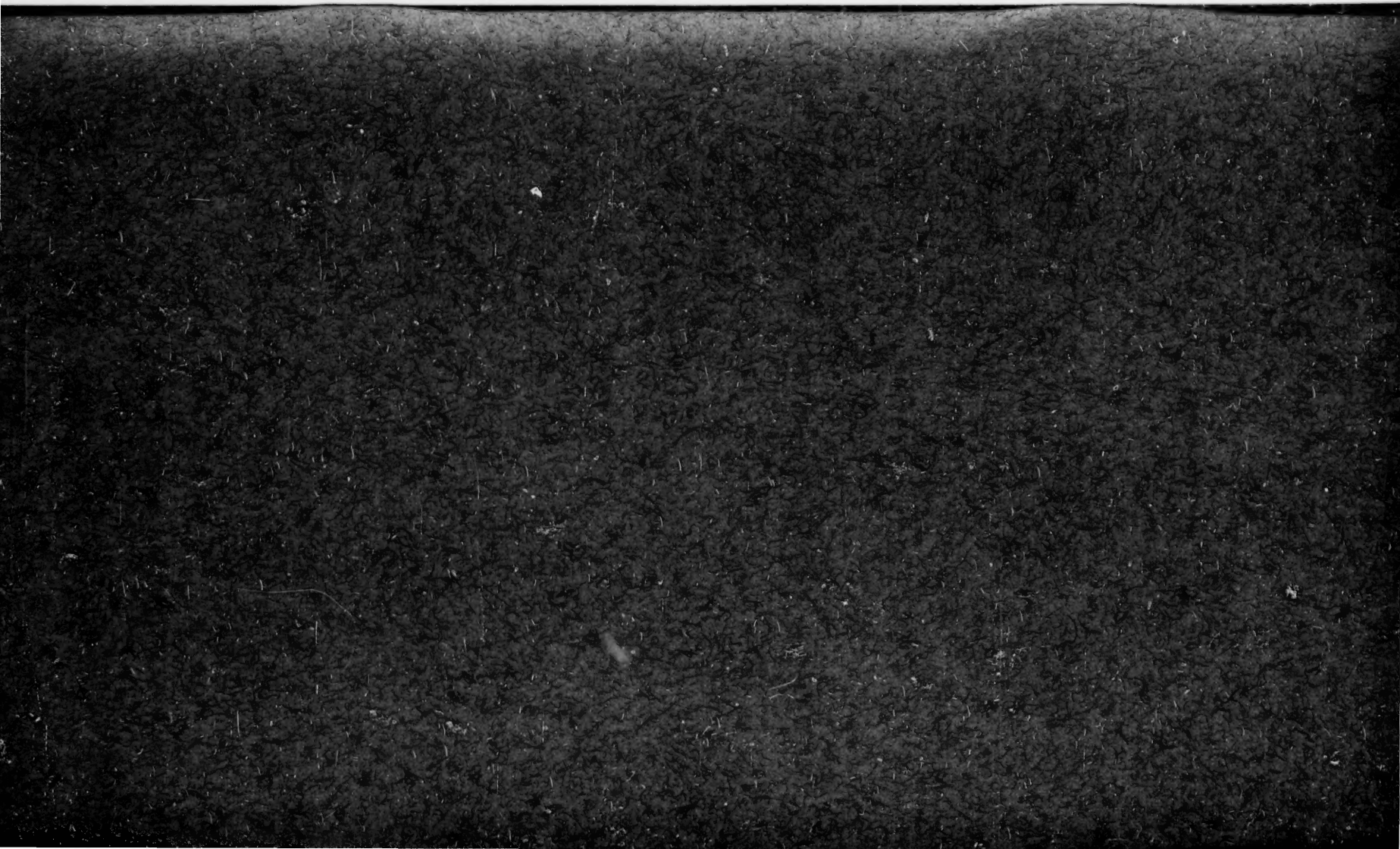

QUESTIONS PRESENTED

1. Whether a law enforcement agency deprives an individual of a protected liberty interest when it forwards an investigative report containing defamatory allegations by third parties to the individual's prospective government employers.

2. Whether, if we assume that the transmittal of such a report deprives the individual of liberty, that individual nevertheless receives all the process due if he is given an opportunity to respond to the third-party allegations.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1745

RIXSON MERLE PERRY, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 1-25) is reported at 781 F.2d 1294. The opinion of the panel of the court of appeals (Pet. App. 26-49) is reported at 759 F.2d 1271. The opinion and order of the district court (Pet. App. 50-63) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 64) was entered on January 23, 1986; the petition for certiorari was filed on April 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1976, petitioner applied for a law enforcement job with the Bureau of Alcohol, Tobacco and Firearms (BATF). He was given a tentative offer of employment, and authorized BATF to obtain information about his background, including police and criminal records. BATF in turn contacted the Federal Bureau of Investigation (FBI), which forwarded to BATF a five-page investigative report on petitioner. This report described allegations by third parties that petitioner on several occasions had impersonated federal and state law enforcement officers, and that he had received poor evaluations during several brief periods of employment. Pet. App. 3-6, 27. The report stated that these allegations were "neither recommendations nor conclusions of the FBI," [1] and it made no recommendation as to whether petitioner should be hired by BATF (*id.* at 3).[2]

After receiving the FBI report, BATF conducted its own background investigation of petitioner, which unearthed additional unfavorable information that had not been recounted in the FBI memorandum (Pet. App. 6-7). BATF also afforded petitioner an

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[1] The report was not compiled for employment purposes; it was created in the course of an FBI investigation into allegations that petitioner had impersonated a federal officer (Pet. App. 3). The United States Attorney declined to prosecute petitioner on this charge (*ibid.*).

[2] In the FBI file released to petitioner, a cover sheet attached to the investigative memorandum contained a statement by an FBI official that the report " 'clearly reflects [petitioner's] unstable nature' " (Pet. App. 3). The en banc court of appeals concluded, on the basis of evidence in the record, that this cover sheet was not among the materials transmitted to BATF (*id.* at 3-4).

opportunity to contest the allegations in the FBI report. Shortly afterwards, BATF withdrew petitioner's offer of employment (*id.* at 7, 28). Petitioner subsequently applied for law enforcement jobs with three other federal agencies (the United States Marshals Service, the Department of Agriculture and the Internal Revenue Service). Each of these applications was rejected after the agency involved received a copy, or learned about the contents, of the FBI report. *Id.* at 28. Petitioner also wrote to the FBI, asking it to amend his file; while the Bureau refused to expunge the challenged allegations, it included in the file a copy of petitioner's letter contesting the accuracy of the information in the investigative report.

2. Petitioner then brought this suit against the FBI and the federal agencies to which he had applied for employment, claiming in relevant part that the information in the FBI report is false and that its dissemination violated his Fifth Amendment right to due process. The district court dismissed the suit (Pet. App. 50-63), holding that "dissemination of the * * * FBI report * * * did not 'stigmatize' the plaintiff and therefore did not implicate the plaintiff's 'liberty' interest" (*id.* at 58).

A divided panel of the court of appeals reversed (Pet. App. 26-49). The panel acknowledged that, under *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Paul* v. *Davis*, 424 U.S. 693 (1976), petitioner would not have stated a claim had he asserted only that the FBI report defamed him, or only that the report prevented him from getting a particular government job (Pet. App. 33). But the court reasoned that a liberty interest is "implicated when * * * the state imposes on an individual a stigma or other disability foreclosing his freedom to take advantage of

other employment opportunities" (*id.* at 34-35). And here, the court held that the FBI report "contains allegations of behavior that effectively foreclose [petitioner's] chances of being employed in the law enforcement field, or being employed by the federal government in any capacity" (*id.* at 40). The court accordingly held that petitioner had been deprived of liberty; it remanded the case to the district court for a determination of what process was due, leaving it open for that court to find that petitioner already had received the requisite procedural protections (*id.* at 40-42).[3]

3. On rehearing en banc, the full court of appeals reversed the panel's holding that petitioner had asserted a cognizable claim against the FBI. The en banc court noted that there was no need in this case "to discourse on due process generally in all job-related circumstances, only to examine [petitioner's] liberty issue in its own particular preemployment factual setting" (Pet. App. 8). In this context, the court held that there were two insurmountable obstacles to the success of petitioner's claim of a deprivation of liberty. The court first held that the FBI report had not "stigmatize[d] [petitioner]" (*id.* at 11-14). In reaching this conclusion, the court emphasized that "[i]n addition to being clearly designated that it was not to be construed as a recommendation [or] conclusion of the FBI, the information [in the report] was presented in a straightforward manner without

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[3] While allowing the case to proceed against the FBI, the court affirmed the dismissal of the claims against the other defendants. The court reasoned that the agencies to which petitioner had applied for employment "have not done anything to make it impossible, or nearly impossible, for [petitioner] to work in law enforcement." Pet. App. 43.

editorial comment" (*id.* at 12). Because the FBI did not defame petitioner, the court concluded, the Bureau should not be deemed to have deprived him of liberty by foreclosing his prospects for employment.

Equally as important, the court noted that petitioner's claim did not present "the more serious situation of a firing or a failure to rehire a government employee" (Pet. App. 10). In the "preemployment context" presented here (*ibid.*), the court reasoned that "a liberty interest is not implicated merely by a reduction in an individual's attractiveness to potential employers" (*id.* at 15). The court thus held that "[a] mere failure to hire, considering all the circumstances of this case, does not meet the 'stigma plus' standard" (*id.* at 16). Under that due process doctrine, the court explained, "although a stigma to reputation alone does not constitute a deprivation of liberty, 'infliction of a stigma accompanied by a *failure to rehire* (or *a fortiori*, by a *discharge*) states a claim for deprivation of liberty without due process' " (*id.* at 16 n.6 (citation omitted; (emphasis added)). The asserted defamation of petitioner was not associated with the loss of employment, however, which led the court to conclude that a liberty interest had not been implicated by the distribution of the FBI report.

The en banc court also added an alternative holding: it concluded that even if petitioner had been deprived of liberty, the deprivation had been accompanied by due process. The court explained that petitioner's "vague request on appeal and at rehearing for a hearing to 'clear his name' has in essence been satisfied as [petitioner] had numerous opportunities, short of a full hearing, which he took advantage of to protect his interests" (Pet. App. 17). These included petitioner's discussion of the FBI report "in

detail with various federal officials in person, by letter, [and] by phone," as well as the inclusion in his FBI file of a letter challenging the accuracy of the report. In these circumstances, the court concluded that "additional due process requirements would constitute an unnecessary and impractical burden on federal law enforcement practices." *Ibid.*[4]

ARGUMENT

Petitioner takes issue with both of the en banc court's alternative holdings—its ruling that petitioner was not deprived of liberty and its independent conclusion that, even if such a deprivation took place, he was accorded all the process due—asserting that both holdings are inconsistent with the decisions of this Court and of other courts of appeals. These contentions are without merit. Petitioner's criticism of the en banc court's first holding is grounded on a misreading of the court of appeals' opinion; his challenge to the second relies on a misunderstanding of the law.

1. a. In challenging the court of appeals' holding that he was not deprived of liberty, petitioner contends (Pet. 6-11) that the court disregarded the import of the so-called "stigma-plus" doctrine. That

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[4] Judge Posner concurred (Pet. App. 19-21), noting that a traditional defense to the common law tort of defamation "is the qualified privilege for internal communications on official business" (*id.* at 20). Judge Posner found that privilege applicable here, where the claim involved only "internal governmental communications on matters of governmental concern" (*id.* at 21). Chief Judge Cummings and Judge Cudahy, the members of the panel majority, dissented (*id.* at 21-24). They adhered to the views expressed by the panel, taking issue with what they termed the en banc court's conclusion that the FBI report did not stigmatize petitioner and did not foreclose his employment opportunities (see *id.* at 22).

label has been applied to this Court's suggestion that injury to reputation, when combined with loss of government employment or other grievous injury, may result in the deprivation of a liberty interest. The Court has found this doctrine applicable even when the individual who lost his government employment was not tenured, and therefore did not have an independent, constitutionally protected property interest in that employment. See *Owen* v. *City of Independence*, 445 U.S. 622, 633 n.13 (1980). Petitioner insists that the en banc court's holding abandoned this aspect of the stigma-plus doctrine.

In fact, however, the court of appeals explicitly reaffirmed the stigma-plus doctrine (see Pet. App. 16 & n.6), and cited with approval previous decisions of the Seventh Circuit in which the doctrine was applied (*id.* at 11 (citing *Munson* v. *Friske*, 754 F.2d 683 (1985), and *Lawson* v. *Sheriff of Tippecanoe County*, 725 F.2d 1136 (1984)).[5] The court of appeals held only that the doctrine was inapplicable in the "circumstances of this case," where the alleged injury to reputation was associated with a "mere failure to hire" (Pet. App. 16) rather than with "the more serious situation of a firing or failure to rehire a government employee" (*id.* at 10).

The en banc court's holding that the stigma-plus doctrine is inapplicable in this sort of "preemployment context" (Pet. App. 10) is entirely consistent with the decisions both of this Court and of the courts of appeals. This Court has emphasized that the doctrine comes into play only when the defamatory ma-

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[5] In a decision handed down after the ruling in this case, the Seventh Circuit again reaffirmed its adherence to the stigma-plus doctrine. *Ratliff* v. *City of Milwaukee*, No. 85-1946 (July 9, 1986), slip op. 25.

terial is circulated "in connection with [the plaintiff's] termination" (*Codd* v. *Velger*, 429 U.S. 624, 628 (1977)); it is the dismissal or other action *changing* the plaintiff's status that "trigger[s] the due process right to a hearing." *Owen*, 445 U.S. at 633 n.13. See *id.* at 661 (Powell, J., dissenting); *Codd*, 429 U.S. at 629 (Brennan, J., dissenting); *id.* at 633 (Stevens, J., dissenting). Cf. *Bishop* v. *Wood*, 426 U.S. 341, 348 n.12 (1976). Indeed, petitioner's suggestion that the stigma-plus doctrine is applicable in the preemployment setting is squarely foreclosed by *Paul* v. *Davis*, 424 U.S. 693 (1976), where the Court held that defamatory government statements did not give rise to a deprivation of liberty even though those statements "seriously impair[ed] [the plaintiff's] future employment opportunities." *Id.* at 697; see *id.* at 720, 734 (Brennan, J., dissenting); *Codd*, 429 U.S. at 633-634 (Stevens, J., dissenting).[6]

Given this background, it is not surprising that the courts of appeals have applied the stigma-plus doctrine only when the plaintiff was defamed in connection with a termination of government employment. That was the situation involved in each of the cases relied upon petitioner (Pet. 8-9 & n.2).[7] Conversely,

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[6] It has been suggested that the stigma-plus doctrine is in tension with *Paul*, because the doctrine's premise is "that an unprotected interest in an untenured position plus an unprotected interest in reputation equals a protected interest. The logic of this analysis is not crystalline" (*Mosrie* v. *Barry*, 718 F.2d 1151, 1163 n.8 (D.C. Cir. 1983) (Ginsburg, J., concurring)). Because the doctrine is inapplicable here on its own terms, however, this case does not offer the Court an opportunity to consider the consistency of the doctrine with *Paul*'s holding.

[7] Indeed, several of those decisions explicitly noted that such a change in status was crucial to the existence of a cause of

the courts of appeals explicitly have declined to apply the doctrine when the plaintiff did not suffer that sort of concrete change in circumstances. See, *e.g.*, *Robb* v. *City of Philadelphia*, 733 F.2d 286, 294 (3d Cir. 1984) (defamation associated with denial of promotion and denial of transfer insufficient to implicate liberty interest); *Moore* v. *Otero*, 557 F.2d 435, 437-438 (5th Cir. 1977) (defamation associated with demotion insufficient); *Sullivan* v. *Brown*, 544 F.2d 279, 283-284 (6th Cir. 1976) (defamation associated with reassignment insufficient); *Hardiman* v. *Jefferson County Board of Education*, 709 F.2d 635, 638-639 (11th Cir. 1983) (defamation associated with suspension with pay insufficient); *Mosrie* v. *Barry*, 718 F.2d 1151, 1161-1162 (D.C. Cir. 1983) (defamation associated with transfer to less desirable assignment not sufficient).[8] Because petitioner cannot point to a termination of employment or other substantial change in circumstances, his claim would not prevail in any court of appeals. His allegation of a conflict in the circuits accordingly is chimerical.

b. It may be added that the en banc court also held the stigma-plus doctrine to be inapplicable here for an entirely independent reason, which is not even ad-

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action. See, *e.g.*, *Dennis* v. *S & S Consolidated Rural High School District*, 577 F.2d 338, 343 (5th Cir. 1978).

[8] In *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984), the court held that a liberty interest was implicated when, in connection with the imposition of a stigma, the federal government failed to reemploy the plaintiff in a GS-13 position, instead offering him only a temporary GS-12 slot. The court emphasized that a liberty interest may be implicated only where the government's action "effects 'a removal, extinguishment, or significant alteration of an interest recognized and protected by . . . law.'" *Id.* at 1415 (citation omitted).

dressed by petitioner: the court found that the FBI report did not impose a stigma on petitioner. As the court noted, the FBI did not itself characterize petitioner's conduct in any way, and it did not disseminate its report to persons outside of the government. Instead, it forwarded information that had been provided by third parties during the course of an independent criminal investigation to petitioner's prospective government employers. In doing so, the FBI emphasized that the report "contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency." C.A. App. 2.

This Court never has held that the government's neutral transmittal of information provided by third parties—particularly a transmittal only to other government agencies—imposed a stigma within the meaning of the stigma-plus doctrine. Cf. *Codd*, 429 U.S. at 626; *id.* at 638 n.11 (Stevens, J., dissenting). Compare *Owen*, 445 U.S. at 633 n.13. Indeed, none of the decisions cited by petitioner (Pet. 9 n.2) held that the government had stigmatized an individual when it acted only as a conduit for information.[9] And the absence of any such decision is not accidental: it follows from the nature of the interests protected by the stigma-plus doctrine. Where the allegations of improper conduct have been leveled by a third party, have not been disseminated by the government to persons outside the government, and expressly have not

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[9] To the contrary, in *Doe* v. *Department of Justice*, 753 F.2d 1092, 1108 (D.C. Cir. 1985) (emphasis added) (cited by petitioner at Pet. 8), the court of appeals acknowledged that "the government must be the *source* of the defamatory allegations" if a liberty claim is to be stated.

been endorsed by any government agency, the plaintiff's reputation has not been sullied by " 'what the government is doing to him.' " *Owen*, 445 U.S. at 633 n.13, quoting *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971). Similarly, the only remedy available to an individual who has suffered a deprivation of liberty under the stigma-plus analysis is " 'an opportunity to clear his name' " (*Codd*, 429 U.S. at 627 (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 573 n.12 (1972)). When the government has not itself characterized the plaintiff, there is no call for a response to defamatory government action.[10]

2. Petitioner also takes issue (Pet. 11-12) with the en banc court's holding that, if a liberty interest was implicated here, he received all the process due. Even if this contention had substance, the validity of the court's alternative holding that petitioner was not deprived of liberty would make its consideration by this Court unnecessary. But petitioner's claim of a conflict in the circuits on this point is, in any event,

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[10] This conclusion draws support from *Davidson* v. *Cannon*, No. 84-6470 (Jan. 21, 1986), and *Daniels* v. *Williams*, No. 84-5872 (Jan. 21, 1986), which held that the Due Process Clause "is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson*, slip op. 3. Here, petitioner has not seriously contended that the FBI acted maliciously; while he states his belief that "the FBI is disseminating an untrue report about him in retaliation for his breach of an employment contract with the FBI and his subsequent criticism of the agency" (Pet. 4), the en banc court determined that petitioner never "attempted to show that the FBI actually fabricated false information and distributed it with some malicious intent" (Pet. App. 15). Yet if petitioner's claim is simply that the FBI denied him due process by failing to exercise due care in passing along a file without checking the accuracy of its contents, the claim cannot survive *Davidson* and *Daniels*.

unfounded, and his fact-bound contention that he did not receive due process is without merit.

Petitioner asserts that when an individual suffers a deprivation of liberty in the stigma-plus context, the government must hold a hearing to give that individual an opportunity to clear his name. In support of this proposition, petitioner cites *Codd* v. *Velger*, *supra*, and several decisions of the courts of appeals. But *Codd* did not purport to establish a firm rule that formal hearings are required to provide adequate process whenever defamation occurs. Instead, *Codd* indicated that the heart of the due process guarantee is the individual's right to receive a meaningful opportunity to respond to the defamatory material: "the remedy mandated by the Due Process Clause of the Fourteenth Amendment is 'an opportunity to refute the charge.'" 429 U.S. at 627 (quoting *Roth*, 408 U.S. at 573). See generally *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), slip op. 12. Similarly, we are aware of no decisions by the courts of appeals requiring an evidentiary hearing in a situation such as the one here, where an individual seeking government employment wishes to contest charges made by third parties.[11] To the contrary, the panel of the court of appeals that originally found a deprivation of liberty here itself acknowledged (Pet. App. 40-42) that petitioner might already have received due process.

Because "due process is flexible and calls for such procedural protections as the particular situation demands" (*Morrisey* v. *Brewer*, 408 U.S. 471, 481

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[11] In the cases cited by petitioner (Pet. 11-12), courts held that hearings were required to allow plaintiffs to refute governmental accusations made in the course of the termination of employment.

(1972)), it is clear that a formal hearing was not required in the circumstances of this case. Obligating the FBI to hold a hearing whenever it wishes to forward an investigative report to a sister law enforcement agency would be extraordinarily burdensone, and would likely chill the willingness of such agencies to share information (see Pet. App. 18). Applying the balancing test articulated in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), the court of appeals accordingly determined that

> [t]he burden on the government, and particularly the FBI, of holding a full hearing in these circumstances for every unsuccessful job applicant would not only be enormous, but also misguided. On balance, the risk to public safety far outweighs the possibility that some potential law enforcement employer might rely on the leads in the FBI file, without more, in rejecting an otherwise qualified applicant who disputed the validity of the information.

Pet. App. 18.

Against this background, petitioner plainly received ample opportunity to contest the information in the FBI report. The report itself contains petitioner's denial of at least one alleged incident and his explanation of another; the FBI also placed in petitioner's file his letter contesting the accuracy of the remainder of the allegations (Pet. App. 17). In addition, BATF afforded petitioner several opportunities to challenge the material in the report (*id.* at 6-7). This procedural course gave petitioner a full " 'opportunity to refute the charge[s]' " (*Codd*, 429 U.S. at 627 (citation omitted)), and therefore afforded him all the process due.

CONCLUSION

The petition for a writ of certiarari should be denied.

Respectfully submitted.

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